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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Covello, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of conviction as to petitioner entered by the United States District Court for the Southern District of New York, Mansfield, J., upon eight counts of a nineteen count indictment for conspiracy to violate and substantive violations of federal wagering statutes, 18 U.S.C. §§ 1084, 1952.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix to this Petition. (App. 1a-26a.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1969. (App. 27a.) Petition for Rehearing was filed April 7, 1969; the Court of Appeals invited an answer from the Government on April 21, 1969 (App. 28a); the Government's answer was filed May 5, 1969; the Petition for Rehearing was denied by the Court of Appeals May 15, 1969 (App. 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in construing the Jencks Act, 18 U.S.C. § 3500:

a. In subsection (a), which prescribes the scope of the Act, the term "trial of the case" includes an evidentiary hearing on a pretrial motion.

b. Subsections (b) and (c), which limit producible statements and excerpts to those that "relate to the subject matter" of a Government witness' direct testimony, authorize production of all portions of the witness' statement which are material to the preparation of proper cross-examination.

c. Subsection (d), which imposes sanctions for an election by the Government not to comply with a disclosure order under the Act, should be applied where the agents of the FBI follow a regular practice of destroying original handwritten notes after a typewritten interview report has been prepared.

d. In subsection (e), which defines the kinds of "statement" covered by the Act, the term "statement" includes a witness' federal income tax return or other governmental document signed by the witness but submitted to the government for reasons unconnected with the criminal investigation.

2. Whether, in light of *Dennis* v. *United States,* 384 U.S. 855 (1966), the rule of *Costello* v. *United States,* 350 U.S. 359 (1956), apparently allowing all federal indictments to be returned solely on hearsay evidence, should be reconsidered and limited.

3. Whether a defendant has the standing requisite to obtain an evidentiary hearing upon a motion to suppress fruits of electronic eavesdropping:

a. Where eavesdropping at the premises of a third party is first revealed while the defendant's appeal from conviction is pending and the defendant alleges that he was frequently present on the "bugged" premises during the period of the conceded electronic surveillance thereof.

b. Where the person overheard was the speaker at the other end of a telephone communication to the defendant's alleged premises.

STATUTE INVOLVED

The Jencks Act, 18 U.S.C. § 3500, provides:

> "§ 3500. Demands for production of statements and reports of witnesses
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of

the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be

reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT

Petitioner, Joseph Covello, was tried with three co-defendants upon a 19 count superseding indictment charging conspiracy to violate and 18 substantive violations of federal statutes proscribing interstate wagering activities, 18 U.S.C. §§ 1084, 1952. (13a-18a.)[1] Basically the indictment charged that the defendants used interstate telephone facilities between New York and New Jersey, and interstate travel between New

[1] Record references are to the printed Appendix in the Court of Appeals, unless otherwise indicated.

Jersey and New York, in carrying on a bookmaking enterprise in violation of New Jersey law. Petitioner was convicted upon the conspiracy count and seven substantive counts, and acquitted by the jury on the remaining eleven substantive counts. (471a-72a.) He was sentenced to three years' imprisonment, and his conviction was affirmed by the United States Court of Appeals for the Second Circuit. One of the co-defendants was acquitted by the trial court at the close of the Government's case (411a); the other two co-defendants were found guilty by the jury on the conspiracy count and various substantive counts in which they were named (471a-72a), were sentenced to six months' imprisonment and did not appeal.

The testimony upon which petitioner Covello was convicted came from four Government witnesses from New York, who testified to their interstate wagering transactions with Covello, who was a resident of New Jersey. The principal Government witness was Merrill Garfinkel; the others were his brother Howard Garfinkel, Herbert Seid and Vincent Conour.

Petitioner, who was employed as the manager of a Newark night club during the period in issue (391a, 409a), acknowledged in both opening statement (134a) and summation (418a-24a), that he had participated in wagering transactions with the Government witnesses. The key factual issue for the jury to determine was which party to the wagers was the bookmaker—petitioner or the Government witnesses. That petitioner was in the bookmaking business was an essential element that had to be proved under the indictment and the instructions (435a-36a). The defense contention in this regard was, as summarized by the court to the jury:

> "The defendants further contend that the Government has failed to establish beyond a reasonable doubt that Covello was a professional bookmaker but, on the contrary, they say the evidence shows that the bookmakers were Merrill Garfinkel, Seid and Conour, and that most of the evidence indicates that Covello and Molinaro were merely placing bets with Garfinkel, Seid and Conour as bookmakers." (440a-441a.)

The Government in summation told the jury to acquit petitioner in five minutes if they did not find that he was a bookmaker. (Trial Transcript, p. 960.)

Following the direct testimony of the principal witness, Merrill Garfinkel, the trial court ruled that numerous excerpts from FBI interview reports of Merrill Garfinkel, and some entire reports, should be withheld from the defense. Having conducted an *in camera* examination of such excerpts and reports pursuant to 18 U.S.C. § 3500(c), the court recited that it did not find "any material in there other than what has already been turned over that relates to the direct of the witness." (202a-03a.) A similar ruling was made with respect to portions of two FBI interview reports of the witness Howard Garfinkel. (255a.) The withheld materials were sealed for purposes of appellate review of their producibility. (10a, 199a, 203a-04a, 255a, 469a.) On appeal petitioner, without the benefit of knowing the content of the sealed materials, requested that the Court of Appeals review the question of their producibility. The Court of Appeals, having conducted such review, concluded:

> "We have examined the sealed statements and we hold that the trial court did not commit error. In essence the withheld materials related to the Garfinkels' knowledge of the gambling activities

of persons other than the defendants. While the information contained in these materials may have been employed by defense counsel to show that the Garfinkels, whose 'betting line' activities they had themselves testified to, were engaged in the business of bookmaking, it is clear that the information the trial judge withheld was not sufficiently relative to the subject matters the witnesses had testified about to fall within the limits of demandable material Congress had carefully delineated in 18 U.S.C. § 3500; and if the defense demand had been complied with the judge would have exceeded the statutory proscription embodied within 18 U.S.C. § 3500 (b).'" (App. 17a.)

The Court of Appeals also affirmed the trial court's rulings (202a, 256a, 314a) denying production under the Jencks Act of the federal income tax returns of the Government witnesses for the years of their wagering transactions with petitioner.[2] The Court of Appeals held:

"Appellant also contends that he was entitled to the federal income tax returns of the Government's main witnesses as 'statements' of the witnesses within the meaning of 18 U.S.C. § 3500(e)(1). While there is no decision on point, the argument is unpersuasive. The filing of the returns of the witnesses was unconnected with the investigation of Covello's activities or the criminal proceedings initiated against him, and the returns were filed with an entirely separate federal agency. Although it is the privilege of defense counsel in

[2] The returns were sealed for purposes of appellate review of their producibility (204a, 257a, 469a), but the trial court's ruling was made without any inspection of the returns to determine their relevance to the witnesses' direct examination, and so far as appears from the opinion the Court of Appeals likewise did not inspect their contents.

> run-of-the-mill situations to decide whether examination of requested material would advantage the defense, here it seems clear that these income tax returns could not have been in any way helpful. Each witness admitted that he had not reported any income he received from gambling activities, and, as the witnesses had testified they had gambled, these confessions were the most Covello could have hoped to extract from them, for the only purpose the returns could have been used for was that of impeaching the credibility of the makers, see *Rosenberg* v. *United States,* 360 U.S. 367 (1959). Therefore, we do not rule upon the issue appellant would have us rule upon but state that under the circumstances here it would not appear to have been error to have withheld the returns; but, if error, the error did not prejudice the defense in any way." (App. 16a.)

The defense received under § 3500 at trial a number of typewritten FBI interview reports (or excerpts therefrom) of Government witnesses. Specific requests under § 3500 for production of the FBI agents' handwritten notes of these interviews were unavailing, because in each instance the interview notes had been destroyed. (200a, 220a, 223a, 315a, 358a-61a.) According to the testimony on *voir dire* of the two agents who had destroyed the notes, the agent had not received any directive from the FBI on the subject of conserving or destroying interview notes (229a, 365a), but each made it his regular practice to destroy interview notes after preparing a typewritten report. (223a, 230a-31a, 358a-61a, 365a.) Each agent testified that his destruction of the notes was not for the purpose of preventing defense counsel from obtaining them at trial. (223a, 359a.) But it was acknowledged by the agent who prepared most of the interview re-

ports that a trial was contemplated at the time the notes were destroyed.

> "Q. At the time you were conducting these interviews did you anticipate that the case would eventually be presented to a grand jury? A. Yes, I did.
>
> "Q. And did you anticipate it would eventually be tried in this court? A. Yes, sir.
>
> "Q. And at the time you destroyed your notes, did you anticipate that the case would eventually be presented to a grand jury? A. Yes, sir.
>
> "Q. And did you at that time anticipate that the case would eventually be tried in this court? A. Yes, sir." (364a.)

The Court of Appeals, affirming the trial court's ruling that the destruction of interview notes did not warrant the striking of the interviewee-witness' direct testimony pursuant to § 3500(d), rejected petitioner's claim "that the good faith destruction of handwritten interview notes deprived him of his rights at trial under the Jencks Act." (App. 14a-16a.)

Electronic Eavesdropping

The trial court held an evidentiary hearing upon petitioner's pretrial motion to suppress the fruits of electronic eavesdropping upon interstate telephone calls made by one Pasquale Borgese from New York telephone booths[3] to the New Jersey number ORange 6-

[3] The validity of the eavesdropping upon Borgese, conducted by means of microphones concealed in telephone booths, was pending before the Second Circuit upon Borgese's appeal at the time petitioner's pretrial motion to suppress was filed. (See Judge Frankel's opinion herein, 68a-71a.) During petitioner's trial the Government informed the Court of Appeals that Borgese's conviction was tainted by previously unrevealed wiretapping, and in consequence Borgese's conviction was reversed without deciding the validity of the eavesdropping upon Borgese's calls from the telephone booths. *United States* v. *Borgese*, 372 F. 2d 950 (2d Cir. 1967).

1730. The fact of the eavesdropping was not disputed, but the Government's sole witness at the hearing, FBI agent Neumann, testified that the information for the instant prosecution was derived solely from an independent source (75a-77a). Petitioner's motion for production under 18 U.S.C. § 3500 of the agent's reports, insofar as they related to the agent's direct testimony on the motion to suppress, was denied on the ground that § 3500 has no application to a hearing on a motion to suppress (77a-80a). The Court of Appeals upheld this ruling. In interpreting the prohibition of 18 U.S.C. § 3500(a) against production "until said witness has testified on direct examination in the trial of the case", the Court of Appeals followed cases which "construed the statute literally, reading 'trial' to mean 'trial' ". (App. 11a-14a.)

The trial court, following conclusion of the evidence at trial, ruled that it had not been derived from an eavesdrop upon Borgese's telephone calls to ORange 6-1730; the legality of the eavesdrop was therefore not decided. (412a-13a.) On appeal, where petitioner challenged procedural rulings that had led to this conclusion, the Court of Appeals did not pass on such challenges nor on the legality of the eavesdrop; the opinion apparently held that petitioner lacked standing because he had not shown that his conversations were overheard in the eavesdropping upon Borgese's end of the telephone calls to ORange 6-1730.[4] (See App. 19a-20a and n. 18.)

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[4] The jury had convicted petitioner on the five substantive indictment counts based upon calls by Merrill Garfinkel to ORange 6-1730, but had acquitted him on the eleven substantive counts based upon Merrill Garfinkel's calls to other New Jersey telephone numbers. (38a-39a, 471a-72a.)

While petitioner's appeal was pending, the United States Attorney for the District of New Jersey filed a pleading in another case, *United States* v. *DeCavalcante,* Crim. No. 111-68 (D. N.J.), admitting electronic eavesdropping during lengthy periods of time at four locations, three in New Jersey and one in Pennsylvania. In correspondence treated by the Court of Appeals as supplemental briefs (App. 21a), petitioner asserted that he had been present at two of these New Jersey locations on numerous occasions during the period of the eavesdrops. (App. 23a, 24a.) On the basis of information furnished by the FBI that "Covello could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations" (App. 23a, n. 15), the Court of Appeals rejected petitioner's contention that the case should be remanded for an evidentiary hearing at which he could cross-examine the surveilling agents and seek to establish that unidenfified voices overheard by the eavesdropping included his. (App. 21a-26a.)

Grand Jury Procedures

The Court of Appeals also affirmed the trial court's denial of a motion in arrest of judgment. (App. 18a.) The motion was premised on the revelation during trial that the indictment had deliberately been obtained upon hearsay testimony, instead of calling any of the witnesses to the alleged transactions with petitioner before the grand jury. The Court of Appeals, while disapproving the practice followed, accorded no remedy. The court held:

> "The Government's four main witnesses, Merrill and Howard Garfinkel, Seid, and Conour, did not testify before the grand jury that returned the

original indictment or the grand jury that returned the superseding indictment. *Though these witnesses were available to be called the only evidence presented to either grand jury was hearsay testimony by FBI agents who related statements made to officers by Merrill Garfinkel and Conour.* This was discovered by the defense at trial and appellant, attacking the validity of the indictment, moved in arrest of judgment. This motion was denied. We affirm. In *Costello* v. *United States,* 350 U.S. 359 (1956) the Supreme Court held that an indictment based exclusively on hearsay need not be dismissed. See also *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400 (1958). *Though we have recently voiced our disapproval of indictments grounded totally on hearsay where the witnesses whose information was related to the grand jury by others were available to testify in person, we have never quashed an indictment for this reason. United States* v. *Umans,* 368 F. 2d 725, 730 (2 Cir. 1966), *cert. dismissed as improvidently granted,* 389 U.S. 80 (1967); . . ." (App. 18a; emphasis supplied.)

REASONS FOR GRANTING THE WRIT

1. The Jencks Act, 18 U.S.C. § 3500, has now been in effect for a dozen years and is daily invoked and applied in the district courts. Yet in administering the Act the district courts have been without guidance from this Court on several basic questions of statutory interpretation. The instant case presents important questions of construction involving each of the subsections (a) through (e) of the Act. These questions were raised in the District Court, and considered at some length in the Court of Appeals' opinion; the instant record thus affords an opportunity for this Court in a single case to resolve a number of important questions in interpretation of the Act. Since the resolu-

tion of each question requires consideration of the purpose and design of the statute as a whole, petitioner respectfully submits that it may be helpful to the Court to consider these questions in a case where they are presented together on one record, rather than to face them piecemeal over the years.

The four questions of Jencks Act construction which this case illustrates and presents may best be set forth here in the chronological order in which they arise in the administration of a federal criminal prosecution.

(i) At the stage when the prospective government trial witness is interviewed by government agents [See § 3500(d)]

As illustrated by this case, it appears to be a regular practice of interviewing agents of the FBI to make contemporaneous handwritten notes during their interview of a witness, then to prepare a typewritten interview report, following which the handwritten interview notes are destroyed. The recurrent nature of this problem was indicated by Judge Sobeloff in *United States* v. *Johnson,* 337 F. 2d 180 (4th Cir. 1964), *affirmed* 383 U.S. 169 (1966), *cert. denied Edlin* v. *United States,* 385 U.S. 846 (1966):

> "This is not the first time that a court has been called upon to consider the effect of the destruction of FBI interview notes. *Campbell* v. *United States,* 373 U.S. 487, 83 S. Ct. 1356, 10 L. Ed. 2d 501 (1963); *Killian* v. *United States,* 368 U.S. 231 (1961); *Ogden* v. *United States,* 323 F. 2d 818, 820-821 (9th Cir. 1963); *United States* v. *Greco,* 298 F. 2d 247 (2d Cir. 1961). *Each time the problem has arisen the FBI has claimed that the notes were destroyed as part of FBI routine. This is really not a satisfactory answer.* . . . One of the purposes of both the Jencks decision and the Jencks Act is to afford the defense an opportunity

to impeach witnesses. *Palermo* v. *United States,* 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287 (1959); *United States* v. *Wenzel,* 311 F. 2d 164, 171 (4th Cir. 1962). The destruction of interview notes does not advance this purpose. Of course, a district court may find as a fact that the notes were not a substantially verbatim record, or that they were accurately copied into a report and then destroyed in good faith, but the necessity for inquiries along this line can be avoided by the preservation of notes until after the trial. Eliminating uncertainty may serve the interest of the Government no less than the defendant." 337 F. 2d at 201-02 (emphasis supplied).

The continuance of such destruction of notes "as part of FBI routine" is difficult to accept in light of the Solicitor General's representation to this Court—when he urged the Court to deny certiorari on the issue of destruction of interview notes—that:

> "Procedures have since [*i.e.* since the interview involved in *Campbell*] been established under which the FBI makes every effort to prepare statements of reports in a form that would render them producible under 18 U.S.C. § 3500. And while it is not deemed administratively feasible to retain all the personal notes taken by the Agent, *those notes which in themselves constitute a producible statement or a transcription thereof are retained for purposes of production under the statute.*" Brief for the United States in Opposition to Petition for Writ of Certiorari, *Campbell* v. *United States,* 373 U.S. 487 (No. 631, Oct. T. 1962), p. 16. (Emphasis supplied.)

In the instant case, unlike *Johnson,* FBI interviews postdate the Solicitor General's representation in *Campbell.* Yet the record here reveals that no method appears to have been employed to communicate that

representation to FBI agents and translate it into FBI policy. The experienced agents who destroyed their notes in the instant case testified that they had not received any directive from the FBI as to preservation of interview notes. (229a, 365a.) Agent Neumann had "always followed this course, policy" of destroying interview notes after preparing his typewritten report. (365a.) He testified that "according to our handbook" notes are to be retained only in accounting cases and uncompleted investigations of applicants, but not in criminal investigations. (365a.) It is also apparent that the "handbook" did not require complete typewritten transcription of the handwritten interview notes, since the typewritten interview reports did not include "word for word the materials in [the] handwritten notes" (366a). The typewritten reports included all the items which the agent considered "pertinent", but not usually in the witness' "exact words" (366a).

Trial lawyers, and presumably FBI agents, are aware how much more useful for impeachment purposes may be a statement in which the interviewer has written down the witness' original, unedited observations, than a subsequently prepared "polished" narrative report of the witness' story. "One of the purposes of both the Jencks decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses. *Palermo* v. *United States*, 360 U.S. 343 (1959) . . . . The destruction of interview notes does not advance this purpose." *United States* v. *Johnson*, *supra*, at 202. But this purpose will continue to be retarded unless and until this Court clearly specifies that the regular practice of destroying interview notes will be treated as an election not to comply with the production re-

quirements of the Jencks Act, and therefore be subject to the sanction (striking of the witness' direct testimony) imposed by 18 U.S.C. § 3500(d).

In *Campbell* v. *United States,* 365 U.S. 85, 98 (1961), this Court left open the question whether good faith destruction of handwritten notes deprives the defendant of rights under the Jencks Act. The question was again left open in *Campbell* v. *United States,* 373 U.S. 487, 491, n. 5 (1963) (*Campbell II*). The question should be answered now.

(ii) At the pretrial motion stage [See § 3500(a)]

This Court has never passed upon the question of whether the term "trial of the case" in 18 U.S.C. § 3500(a) includes pretrial hearings. As the opinion below indicates, there is a dearth of appellate authority on this point, outside of the Second Circuit (see App. 14a). Yet the question of the Act's application to a pretrial hearing on a motion to suppress, or to a post-trial hearing on electronic eavesdropping (see *Alderman* v. *United States,* 37 U.S.L.W. 4189 (March 10, 1969)), or to other pretrial or post-trial evidentiary hearings, is of crucial importance in determining the scope of the Act's coverage.

An affirmative answer is also of crucial importance to the opportunity of the defense to controvert the Government's version of the facts at a hearing on a motion to suppress. Frequently such a motion turns upon facts within the exclusive knowledge of a Government agent, *e.g.,* what information he had to give him probable cause for an arrest, or as in the instant case, whether he had an untainted source for leads to evidence. Unless an agent's reports on such matters are producible under § 3500, the defendant and the

Court are left with no adequate basis for testing and evaluating the accuracy of the agent's testimony on the motion.

Under *Palermo* v. *United States*, 360 U.S. 343 (1959), as under the opinion below (App. 12a), unless the agent's report is held producible under § 3500, it is not producible at all. This Court should therefore determine whether the restriction imposed by § 3500 (a) against production "until said witness has testified on direct examination in the trial of the case" should be construed to bar production at pretrial evidentiary hearings.[5] The question takes on added importance in view of the increased scope for pretrial suppression motions provided by the Crime Control and Safe Streets Act of 1968, Pub. L. 90-351. See 18 U.S.C.A. § 2518 (Supp. 1969), which provides for governmental eavesdropping and wiretapping and, in 18 U.S.C.A. § 2518(10)(a), for motions to suppress its fruits; *cf.* 18 U.S.C.A. § 3501(a) (Supp. 1969), which provides for a determination of the voluntariness of a confession outside of the presence of the jury but does not specify whether this may be done by pretrial motion to suppress.

(iii) At the stage of production at trial [See § 3500(e)(1)]

18 U.S.C. § 3500(e) defines the term "statement" as used in the Act. Subsection (e)(1) includes within the definition of "statement": "a written statement made by said witness and signed or otherwise adopted or approved by him". A "statement" within the Act's definition must, on defendant's motion at the close of the witness' direct examination, be produced

[5] The question also arises as to post-trial evidentiary hearings where the witness in question was not a witness at trial.

either directly to the defendant or to the Court for *in camera* examination of relevancy. 18 U.S.C. § 3500 (b), (c)...

The issue presented here is whether a witness' tax return, or other signed document submitted by the witness to a federal agency for purposes unrelated to the criminal prosecution, should be producible to the defense, provided that the return or document contains material relating to the witness' direct testimony. If it contains no such relevant material, the *in camera* inspection by the Court pursuant to § 3500(c) will result in its denial to the defense. But unless the return or other document is held to be a "statement" within the meaning of § 3500(e)(1), it will never be submitted for the Court's *in camera* determination under § 3500 (c).

The language of § 3500(e)(1), literally read, does not require that the witness' signed statement have been made in connection with the investigation or prosecution of the case on trial, or indeed with any criminal prosecution. Petitioner contends that no such limitation should be read into § 3500(e)(1); the Act should require production of any written statement which the witness has given to the Government and which contains material relating to the subject matter of the witness' direct testimony. A typical example of such a "statement", involved in this case, would be the witness' federal income tax return for the year in which he allegedly had the financial transactions about which he has just testified on his direct examination.

The question of whether the Jencks Act definition of "statement" includes a witness' federal income tax return (or other signed documents which he has sub-

mitted to the Government for purposes unconnected with the pending prosecution), appears not to have been considered in any reported decision. However, cases are common in which a defendant is charged with some type of unlawful financial transaction with a Government witness. Likewise, cases in which a Government witness has filed some Government form that covers subject matter about which he is later examined in a criminal prosecution will often arise. In such cases the Government, of course, has access to the witness' statement even though it was obtained independently of the criminal investigation or prosecution. *E.g.*, Treasury Regulations expressly authorize the United States Attorney to inspect and obtain tax returns for use in litigation or preparation for litigation. Treas. Regs. 301.6103(a)-1(g), (h). Under the philosophy expressed by this Court in *Dennis* v. *United States*, 384 U.S. 855, 873 (1966): "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." (Footnote omitted.) *Dennis* cites the Jencks Act as reflecting "the growing realization that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." *Id.* at 870.

Production of a witness' federal income tax return, where it contains information relevant to the witness' direct examination, would serve the purpose of the Act. "The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with the authenticated statements and reports of Government witnesses which relate directly upon his testimony." S. Rep. No. 569, 85th Cong., 1st Sess., p. 2, quoted with approval in *Clancy* v. *United*

States, 365 U.S. 312, 315 (1961). Federal income tax returns, signed under penalty of perjury, are the very type of "authenticated statements" which should have the greatest indicia of reliability and thus constitute the fairest source of impeachment material.[6] Such a return should afford an even more reliable source for fairly impeaching the witness than an interviewing agent's report of an oral statement of the witness, producible under 18 U.S.C. § 3500(e)(2).

(iv) At the stage of in camera inspection [See § 3500(b), (c)]

Section 3500(b) limits the production of statements under the Act to those "which relat[e] to the subject matter as to which the witness has testified." In order to implement this limitation, § 3500(c) provides for

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[6] In the instant case the Court of Appeals held that: "Here it seems clear that these income tax returns could not have been in any way helpful." (App. 16a.) But if the return was a "statement" within the meaning of the Act, this is not a conclusion that can fairly be reached without the defendant having had an opportunity to see the statement and suggest the manner in which it could be used to impeach the witness' testimony. The opinion below apparently assumes that the only possible use of the returns in impeaching credibility was to show that the witness had *omitted* information and income from his return, and states that this much the witness had "admitted" (App. 16a). But the returns of one or more of the four Government witnesses might well have included information or income that would have contradicted the witness' direct testimony. *E.g.*, the witness' return might have shown an income far too small for him to have placed repeated bets with petitioner in the large amounts claimed in the witness' direct testimony. Or conversely, the return might have shown that, despite the witness' "admission" that he had not reported gambling income, he had in fact reported substantial amounts of non-wage income attributed to some unidentified source, such as "miscellaneous income" or "commissions". Such an entry could have been employed on cross-examination to develop that the witness made his living as a gambler and was engaged in the business of bookmaking, as the defense contended (see 420a-23a; pp. 6-7, *supra*).

the inspection by the Court *in camera* of any statement which the Government claims "contains matter which does not relate to the subject matter of the testimony of the witness". If the Court upholds the Government's contention, the matter in issue is withheld from the defense. The same procedure is followed, as it was herein, where the Government contends that an entire statement "does not relate to the subject matter of the testimony of the witness". In the instant case, pursuant to the *in camera* inspection, some statements were withheld in their entirety and others in part.

This Court has never defined the test of relevancy to be applied in determining whether a statement or portion thereof "relates to the subject matter" of the witness' direct testimony. In *Rosenberg* v. *United States,* 360 U.S. 367, 370 (1959), this Court held that: "A statement by a witness that she fears her memory as to the events at issue was poor certainly 'relates to the subject matter as to which the witness has testified' and should have been given to defendant." This indicates that the statutory language extends to impeaching information not mentioned by the witness during direct examination. But it does not spell out a standard of relevancy.

The Circuit which has most clearly enunciated a test of relevancy under § 3500(b) and (c) is the Ninth:

> "[T]he test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to. The problem is not whether a question framed precisely in the terms of the withheld information would relate to the subject matter of the direct examination, but rather *whether the withheld material might be useful in framing questions which would be rele-*

> *vant to that subject matter.* The appropriate analogy is found in Rule 16 of the Federal Rules of Criminal Procedure, and *the proper inquiry is whether the omitted portions of the statement 'may be material to the preparation' of proper cross-examination.* Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefit of counsel's more intimate knowledge of the possible significance of particular information for purposes of impeachment." *Ogden* v. *United States,* 303 F. 2d 724, 740 (9th Cir. 1962), *cert. denied,* 376 U.S. 973 (1964). (Emphasis supplied; footnotes omitted.)

In the instant case, it appears that the withheld statements and portions of statements of the Garfinkels would have been producible under the Ninth Circuit test, since they were " 'material to the preparation' of proper cross-examination." They would have been "useful in framing questions which would be relevant to that subject matter" about which the Garfinkels had testified. Petitioner necessarily makes this contention without benefit of any opportunity to have seen the withheld materials. However, the court below acknowledged in its opinion that "the information contained in those materials may have been employed by defense counsel to show that the Garfinkels, whose 'betting line' activities they had themselves testified to, were engaged in the business of bookmaking. . . ." (App. 17a.) Such cross-examination would have borne upon the critical issue of whether it was defendant or Merrill Garfinkel who was the bookmaker in their wagering transactions. (See pp. 6-7, *supra.*) By employing the materials "to show that the Garfinkels . . . were engaged in the business of bookmaking," the defense would have impeached Merrill Garfinkel's direct testimony that he "placed" bets when

he telephoned Covello in New Jersey (145a-46a, 161a-62a). For if the Garfinkels were engaged in the business of bookmaking, this would strongly tend to establish that Merrill Garfinkel had *accepted* the wagers with Covello, not *placed* them. It is the professional bookmaker who "accepts" a wager (see 435a) and his customer who "places" one. *Cf.* 26 U.S.C. § 4401.

The test applied by the Second Circuit was plainly narrower than that of the Ninth, since the court below concluded that the withheld information "was not sufficiently relative to the subject matters the witnesses had testified about to fall within limits of demandable material Congress had carefully delineated in 18 U.S.C. § 3500; and *if the defense demand had been complied with the judge would have exceeded the statutory proscription embodied within 18 U.S.C. § 3500 (b).*" (App. 17a; emphasis supplied.)

Petitioner contends that the Ninth Circuit test in *Ogden* should be adopted by this Court, and that the analogy to Rule 16 standards in the Ninth Circuit test is a useful one. But in any event, petitioner submits, experience under the Act shows that it would be desirable for all the district courts applying the relevancy test under § 3500(b) and (c) to have a guiding standard promulgated by this Court.

2. In *Costello* v. *United States*, 350 U.S. 359 (1956), the Court held that the Fifth Amendment permits any indictment to be returned solely on hearsay evidence, and declined to exercise its supervisory power to establish a rule allowing indictments to be challenged on this basis. *Id.* at 363-64. Petitioner submits that reconsideration of such a supervisory rule is now appropriate, in order to prevent circumvention of the

right established by *Dennis* v. *United States,* 384 U.S. 855 (1966), to obtain the grand jury testimony of Government witnesses for impeachment at trial.

The defendant's right to production of grand jury testimony under *Dennis* is rendered almost meaningless if the Government can avoid production by the expedient of not calling the witness before the grand jury, but instead having an agent read to the grand jury from an interview report. That practice was followed in the instant case although, as the court below found, the trial witnesses were available to be called during the grand jury proceedings (App. 18a). The opinion below likewise indicates that the same practice had come to the Second Circuit's attention in a number of recent cases. (App. 18a.) It seems a reasonable surmise that the origin of this practice lay in the circumstance that, prior to *Dennis,* the Second Circuit had the most liberal rule for production of grand jury testimony for purposes of impeachment at trial. See *Dennis* v. *United States, supra,* at 874 and n. 21. The relation between the *Dennis* and *Costello* rules was noted by Judge Weinstein of the United States District Court for the Eastern District of New York in a recent case where the indictment was based on hearsay. *United States* v. *Arcuri,* 282 F. Supp. 347 (E.D.N.Y. 1968), *affirmed,* 405 F. 2d 691 (2d Cir. 1968), *cert. denied,* Misc. No. 1686, 37 U.S.L.W. 3343 (May 19, 1969).

> "In a burst of exuberance at the release from pre-*Costello* restrictions, federal prosecutors appear to have made substantial use of the technique typified by the instant case." *Id.,* 282 F. Supp. at 348.

The practice of using hearsay instead of eyewitness grand jury testimony has an even more fundamental

vice than depriving the defendant of *Dennis* rights. For it deprives him of any meaningful observance of his Fifth Amendment right to have independent consideration of the case against him by a grand jury. Where the prosecutor has selected an agent without personal knowledge to read statements of witnesses to the grand jury, the latter is reduced to rubber-stamping the prosecutor's judgment that an indictment should be returned. As Judge Weinstein observed:

> "There is no reason to believe that the Supreme Court in *Costello* intended to encourage the practice before grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. . . .
>
> The practice—as in the instant case—of relying on hearsay rather than upon the testimony of eyewitnesses . . . habituates the grand jury to rely upon 'evidence' which appears smooth, well integrated and consistent in all respects. . . . Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically, a prima facie case may have been made out." *United States* v. *Arcuri, supra,* 282 F. Supp. at 349.

In a similar vein, the Second Circuit has noted:

> ". . . excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are sup-

posed to afford to the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." *United States* v. *Umans*, 368 F. 2d 725, 730 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967).

But the Second Circuit in *Arcuri* stopped short of approving Judge Weinstein's statement of a rule that future indictments in his district would be dismissed, and without a showing of prejudice to the defendant, "if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury", 282 F. Supp. at 351.[7] See 405 F. 2d at 694. Since the question is one which involves the use of judicial supervisory powers to protect basic Fifth Amendment rights, a uniform rule for all districts, laid down by this Court, should be considered.

3. This case presents issues concerning standing to suppress the fruits of electronic eavesdropping, which were left unresolved in *Alderman* v. *United States*, 37 U.S.L.W. 4189 (March 10, 1969).

The court below held that: "The rules set forth in *Alderman* do not become operative unless there is an

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[7] In *Costello*, by contrast, it cannot be said that "better evidence was readily available for presentation to the grand jury". *Costello* was an income tax case proved by the "net worth method," and the crucial testimony in such a case is that of the agents who summarize and compute. As Justice Burton's concurring opinion in *Costello* noted, the agents' testimony, although based on transactions of which they lacked personal knowledge, was important and admissible evidence at trial once a foundation had been laid. See 350 U.S. at 364-65 (concurring opinion).

admission by the Government that a pertinent electronic eavesdropping had occurred." (App. 26a.) Petitioner had asserted in the Court of Appeals that he was present on numerous occasions at two locations which, during the pendency of his appeal, were conceded in pleadings filed in another case to have been the subject of prolonged electronic surveillance. Since the Government did not admit that petitioner had been overhead on these eavesdrops but asserted in the Court of Appeals that "Covello could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations" (App. 23a, n. 15), the court denied petitioner's request to remand for a hearing with respect to these two eavesdrops:

> "[O]therwise we would enable any defendant each time an eavesdropping of a location is disclosed subsequent to his trial to assert he was present at that location sometime during the 'bugging' and thereby be entitled to a suppression hearing." (App. 25a.)

Petitioner submits that a defendant who asserts his presence upon premises which were "bugged" should be entitled to an evidentiary hearing at which, if his assertions are established by the proof, he will be accorded standing to suppress the fruits of eavesdropping upon conversations held in his presence, and an opportunity to show that such conversations were overheard. The alternative, of denying an opportunity to prove standing to suppress because the Government has not admitted it, petitioner submits is a misapplication of *Alderman*. Indeed, Alderman was accorded an evidentiary hearing even though the Government asserted in this Court that Alderman—unlike his co-

petitioner Alderisio—"neither participated in any conversations overheard nor had any interest in the places which were the object of the surveillance." 37 U.S. L.W. at 4190, n. 1.

The instant case also presents another question of standing: whether a person whose telephone number is called has standing to suppress the fruits of an eavesdrop that overhears only the caller's end of the conversation. This is a frequent occurrence in cases of eavesdropping, but the criteria of standing laid down in *Alderman* do not clearly resolve the question. The rule announced in *Alderman,* that a defendant has standing to suppress "if the United States unlawfully overhead conversations of a petitioner himself or *conversations occurring on his premises,* whether or not he was present or participated in those conversations", 37 U.S. L.W. at 4192 (emphasis supplied), is not directly addressed to a situation where the eavesdrop occurs at the other end of the telephone line, not located on the defendant's premises. Petitioner submits that this Court should consider whether the rationale of standing in *Alderman* extends to a telephone communication which is transmitted to, and received by telephone at, petitioner's premises,[8] even though the eavesdropping device picks up the caller's words from the other end of the line.

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[8] The Government's allegations and proof in this case were that petitioner used the premises at 312 Park Avenue, East Orange, New Jersey, where telephone number OR 6-1730 was located, as an office for the conduct of his wagering business. The jury convicted petitioner on the counts based on interstate calls to OR 6-1730 and acquitted him on the counts based on interstate calls to the other premises involved in the indictment. Petitioner therefore submits that no affirmative allegation by petitioner of an interest in the premises where OR 6-1730 was located was required to confer standing. *Cf. Jones* v. *United States,* 362 U.S. 257 (1960).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Dated: June 1969

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 322—September Term, 1967

(Argued February 8, 1968 Decided March 24, 1969)

(Final arguments by briefs filed September 23, 1968)

Docket No. 31293

UNITED STATES OF AMERICA, *Appellee,*

—v.—

JOSEPH COVELLO, *Appellant.*

Before: WATERMAN and FEINBERG, Circuit Judges, and BARTELS, District Judge.*

Appellant appeals judgment of conviction entered after guilty verdict at jury trial, United States District Court for the Southern District of New York, Mansfield, *J.* He seeks reversal of rulings below denying his motions to dismiss a nineteen count indictment upon which he was required to go to trial, or alternatively, a reversal and remand for a new trial because of a claimed erroneous denial of his motion to suppress certain evidence and certain claimed various prejudicial erroneous trial rulings. Conviction affirmed.

ROBERT G. MORVILLO, JOHN E. SPRIZZO, Asst. United States Attorneys, ROBERT M. MORGENTHAU, United States Attorney, *for Appellee.*

ROBERT L. WEINBERG, EDWARD BENNETT WILLIAMS, VINCENT J. FULLER, WILLIAMS & CONNOLLY, Washington, D. C., *for Appellant.*

* Of the Eastern District of New York, sitting by designation.

WATERMAN, *Circuit Judge:*

Joseph Covello having been found guilty after a jury trial in the United States District Court for the Southern District of New York appeals from the judgment of conviction entered upon the verdict. He was indicted on nineteen counts,[1] was found guilty on counts 1 through 6, on count 17 and on count 19, and was acquitted by the jurors on each of the remaining eleven counts. We affirm the judgment of conviction.

Count 1 charged appellant Covello and codefendants Thomas Molinaro, Armando Restaino and Anthony Nappi with a conspiracy in violation of 18 U. S. C. § 371[2] to violate federal interstate gambling statutes, 18 U. S. C. § 1084[3]

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[1] This indictment filed February 19, 1965 superseded a prior one from which it does not differ except for the addition of Anthony Nappi as a codefendant in count 1.

[2] § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[3] § 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for

and 18 U. S. C. § 1952.[4]

Counts 2 through 6 charged appellant Covello with using interstate telephone facilities between New York and New

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use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

[4] § 1952, in pertinent part, reads as follows:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(2) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

* * * * *

Jersey in violation of 18 U. S. C. § 1084. Counts 7 through 11 charged Covello and Molinaro, and counts 12 through 16 charged Covello and Restaino, with similar violations of § 1084.

Counts 17 through 19 charged appellant Covello and Molinaro with violation of 18 U. S. C. § 1952 for allegedly traveling in interstate commerce between New Jersey and New York to conduct a business enterprise involving gambling in violation of a New Jersey statute prohibiting bookmaking.

Covello was sentenced to concurrent sentences of three years imprisonment on count 1, two years imprisonment on each of counts 2 through 6, and three years imprisonment on each of counts 17 and 19.[5]

The Government's case in support of the allegations in counts 2 through 16 was based on the testimony of four witnesses and the New York Telephone Company records of toll calls from a New York City number, TR 9-3755, to three New Jersey numbers, OR 6-1730, HU 4-4190, and HU 4-9011. The New York number was listed to Howard Garfinkel at 944 Park Avenue, New York City, where Howard and his brother Merrill Garfinkel lived. The New Jersey numbers were listed to one John Marsh and to de-

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[5] Defendant Nappi was acquitted by the court at the close of the government case. The issues as to the guilt of the other defendants on all nineteen of the counts charged in the indictment were submitted to the jury for resolution. Molinaro was found to be guilty on counts 1, 7 through 11, 17 and 19. He, together with Covello, was acquitted on count 18. Restaino was found to be guilty on counts 1, and 12 through 16. Inasmuch as the court had submitted the cases of Molinaro and Restaino on counts 7 through 11 and 12 through 16 on the theory that these defendants had aided and abetted the criminal activity of Covello and the jury had acquitted Covello on all of these counts the court set aside these verdicts of guilty. Judgments of conviction against Molinaro on counts 1, 17 and 19 and against Restaino on count 1 have not been appealed. Both received six month prison terms.

fendant Molinaro and defendant Hestaino respectively. The toll call records the Government submitted in evidence also showed calls to Covello's home number, PL 9-2829, and to the number of the Chez Charles Night Club, HU 3-9405, where Covello was employed as the manager.

Merrill Garfinkel, the key government witness, testified that during the baseball season of 1961 and throughout the football, basketball, and baseball seasons of 1961 up to June 19, 1963, he furnished Covello, for an agreed biweekly compensation of $200, a "betting line" by telephoning the "line" to a number in New Jersey. In addition, Merrill testified he would wager with Covello for himself and others over the telephone by using the same number. The calls, he said, were usually placed from a New York City phone booth but were made occasionally from his home at 944 Park Avenue. Merrill did not recall the number which he called in New Jersey during the 1961 baseball season, but he did remember the numbers OR 6-1730, HU 4-4190, and HU 4-9011 as the ones by which he reached Covello during the 1962-1963 sporting seasons. He had no recollection of the specific contents of any of these calls.

Howard Garfinkel corroborated the testimony of his brother. He testified that he was sometimes present when Merrill called Covello and that he furnished Covello the "betting line" during periods when his brother was on vacation.

A third witness, Vincent Conour, testified that upon being furnished Covello's number at OR 6-1730 by Merrill Garfinkel, he thereafter telephoned wagers to that number. He also described a visit he made to Covello at 312 Park Avenue, East Orange, New Jersey, the address where OR 6-1730 was located.

A fourth witness, Herbert Seid, testified that he too was introduced to Covello over the telephone by Merrill Garfinkel and that he thereafter placed wagers with Covello

by telephone in 1962 and 1963. He could not remember, however, what numbers in New Jersey he had telephoned.

Counts 2 through 6 on which Covello was convicted involve only the OR 6-1730 number. The other two New Jersey numbers relate to counts 7 through 16 on which Covello was acquitted.

Count 17 was based on the testimony of witness Conour concerning an alleged meeting with Covello and Molinaro at Conour's apartment in New York on May 14, 1962 to settle a balance of $5,123 owed to Conour for his winnings.

Count 19 was based on an alleged settlement meeting in New York on June 13, 1963, at which Covello, Molinaro, Merrill and Howard Garfinkel and Herbert Seid were allegedly present.

The sufficiency of the Government's evidence at trial is not in issue. Appellant's appeal, however, alleges a number of evidentiary errors.

I.

§ 605 of the Federal Communications Act

At the trial the Garfinkels were unable to recall the specific times and date of their alleged phone calls to the defendant. Instead, the Government submitted in evidence the New York Telephone Company's records of toll calls, or "toll slips," made from Garfinkels' home number to the aforementioned New Jersey numbers. The slips showed the number from which the call was placed, the number and city to which the call was placed, the fact that the call was completed, the date and time of the call and the length of the conversation. Appellant's objection to the admissibility of the "toll slips" as evidence obtained in violation of § 605 of the Federal Communications Act of 1934, 47 U. S. C. § 605 (1964), as amended, Omnibus Crime Control and Safe Streets Act of 1968, P. L. 90-351 (June 19, 1968), was denied.

Section 605 then provided:

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utiliz-

ing the contents of any radio communication broadcast, or transmitted by amateurs or others for use of the general public, or relating to ships in distress.[6]

The statute addresses itself to two distinct classes of persons. See *Bubis* v. *United States*, 384 F. 2d 643, 646 (9 Cir. 1967); *United States* v. *Russo*, 250 F. Supp. 55 (E. D. Pa. 1966). In the first category are persons who have to do with the "receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio." The second category encompasses all other persons not within the first class. Arguably, the accounting employees of the New York Telephone Company who furnished the FBI the toll slips in the case at bar, having nothing to do with sending, receiving, or forwarding communications, are not within the ambit of persons proscribed by Clause 1 of § 605, see *Hanna* v. *United States*, 393 F. 2d 700, 705 (5 Cir. 1968) (rev'd on rehearing, 404 F. 2d 405) (5 Cir. 1968); *Bubis* v. *United States, supra* at 646, and we need go no further unless we find an interception as required by Clause 2. For purposes of this case, however, and this case only, we assume, as appellant apparently wishes us to hold, that treatment of the entire telephone company as one person is the sounder construction of the statute. See *Hanna* v. *United States*, 404 F. 2d 405 (5 Cir. 1968); *United States* v. *Russo, supra.*

Defendant argues that the divulgence of the toll slips was a prohibited disclosure by the corporate person of the existence of a communication within the meaning of § 605. We disagree. We cannot subscribe to such a literal application of the statutory language where the effect of such an interpretation is to transgress the obvious congressional

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[6] The recent amendment to 47 U.S.C. § 605 by the Omnibus Crime Control and Safe Streets Act of 1968 does not alter the substance of the original statute set forth in the text above.

intent. Section 605 "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature." *Rathbun* v. *United States*, 355 U. S. 107, 109 (1957).

We agree with defendant that Section 605 was not intended to apply only to the substance of communications, *United States* v. *Dote*, 371 F. 2d 176, 180 (7 Cir. 1966), *affirming United States* v. *Guglielmo*, 245 F. Supp. 534 (N. D. Ill. 1965), and see *United States* v. *Caplan*, 255 F. Supp. 805, 808 (E. D. Mich. 1966), but we are not here involved with the manipulative use of a pen register,[7] as in *Dote* or *Caplan*, or with some other investigatory device.[8]

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[7] The pen register is a mechanical device attached on occasion to a given telephone line, usually at central telephone offices. A pulsation of the dial on a line to which the pen register is attached records on a paper tape dashes equal to the number dialed. The paper tape then becomes a permanent and complete record of outgoing calls as well as the numbers called on the particular line. Immediately after the number is dialed and before the line called has had an opportunity to answer (actually the pen register has no way of determining or recording whether or not the calls are answered) the pen register mechanically and automatically is disconnected. There is neither recording nor monitoring of the conversation. *United States* v. *Guglielmo*, 245 F. Supp. 534, 535 (N. D. Ill. 1965), aff'd, *sub nom. United States* v. *Dote*, 371 F. 2d 176, 180 (7 Cir. 1966).

In *Caplan* the use of a pen register by the telephone company was stimulated by the Internal Revenue Service in conjunction with an investigation that agency was conducting against defendants for suspected violation of gambling laws. *Caplan* is not a case involving only accounting information kept or commonly known to be kept by the telephone company in the ordinary course of the company's business.

[8] A few courts, in fact, have even sustained the admissibility of records obtained by the telephone company through use of pen registers, monitoring, and recording devices, etc., and have upheld subsequent divulgence thereof to a government agency when these devices were employed in connection with any investigations to detect thefts committed against the telephone company. *United*

Rather, the keeping of toll records is a necessary part of the ordinary course of the telephone company's business and is necessary in order that the company may substantiate its charges to its customers. Toll records are kept for all telephone subscribers and are not kept just for subscribers being investigated by officers of the law, or ones suspected of criminal proclivities. The subscriber is fully aware that such record will be made, *United States* v. *Gallo*, 123 F. 2d 229, 231 (2 Cir. 1941), and the records of the telephone company so kept in the ordinary course of the company's business are entitled to the same evidentiary treatment as the records of other businesses. See Federal Business Records Act, 28 U. S. C. § 1732 (1964). Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of that business.

Our disposition of this issue obviates the need for us to consider whether the demand of an FBI agent to obtain the records constitutes "other lawful authority" under § 605, or, of a divulgence to a government investigator had been voluntarily made, whether the issuance of a subpena for the records so as to have them produced at a trial cure any original illegal divulgence, or whether a defendant charged with federal crime has standing to challenge the receipt into evidence against him at his trial of telephone company toll records showing that his number had been called.

States v. *Hanna*, 260 F. Supp. 430 (S. D. Fla. 1966), aff'd, 404 F. 2d 405 (5 Cir. 1968); *Brandon* v. *United States*, 382 F. 2d 607 (10 Cir. 1967); *United States* v. *Beckley*, 259 F. Supp. 567 (N. D. Ga. 1965). Cf. *Bubis* v. *United States*, 384 F. 2d 643 (9 Cir. 1967). Contra, *Huff* v. *Michigan Bell Tel. Co.*, 278 F. Supp. 76 (E. D. Mich. 1967).

II.

Best Evidence Rule

Most of the toll records introduced here were copies rather than originals. Appellant contends that the Government did not lay an adequate foundation for the use of such secondary evidence, and that the court below erred in holding to the contrary. The contention is without merit. The admisssibility of secondary evidence is within the broad discretion of the trial judge. *United States* v. *Ross*, 321 F. 2d 61, 70 (2 Cir.), *cert denied*, 375 U. S. 894 (1963); *Galbreath* v. *United States*, 257 Fed. 648, 658 (6 Cir. 1918); McCormick, Evidence, 414 (1954); 4 Wigmore, Evidence, 340 (3d ed. 1940). The judge here did not abuse his discretion in ruling that the testimony of a security officer of the telephone company that a diligent search of his office had not uncovered the originals was a sufficient foundation for the introduction of the identified copies.

III.

The Jencks Act

Appellant urges that the rights secured to him by the so-called Jencks Act, 18 U. S. C. § 3500 (1964), were violated on several grounds. First, he claims that following the direct testimony of an FBI agent at the pretrial hearing on appellant's motion to suppress evidence obtained through an alleged illegal eavesdrop, discussed *infra*, he was entitled to inspect the agent's reports relating to the agent's testimony, and this inspection was denied him. We approve the ruling below. The Act was enacted by Congress in order to qualify the loose interpretations the lower federal courts[9] had accorded the Supreme Court decision

[9] A collection of the lower federal court cases after *Jencks* v. *United States*, 353 U. S. 657 (1957) and prior to the enactment of 18 U. S. C. § 3500 can be found in the legislative history of that Act. H. R. Rep. No. 700, 85th Cong., 1st Sess. (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957).

in *Jencks* v. *United States*, 353 U. S. 657 (1957), and to provide an exclusive[10] procedure for handling demands by a defendant for the production of statements, reports, and similar material that government witnesses had given to law enforcement agencies prior to the defendant's trial. S. Rep. No. 981, 85th Cong., 1st Sess. (1957), 1957 U. S. Code Admin. News 1861. The specific purposes of the bill were not to make such material available to the defense until "after the Government witness has testified against the defendant on direct examination in open court, and to prevent disclosure before such witness has testified." *Id.* at 1863. Suppression hearings are nowhere alluded to in the legislative history and the statute does not supply any direct guidance for conduct at such hearings.[11] In all

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[10] "The purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U. S. C. § 3500 cannot be produced at all." *Palermo* v. *United States*, 360 U. S. 343, 351 (1959).

See also *Rosenberg* v. *United States*, 360 U. S. 367, 369 (1959); *Canaday* v. *United States*, 354 F. 2d 849, 859 (8 Cir. 1966).

[11] 18 U. S. C. § 3500 (1964) in its entirety reads as follows:

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to

probability Congress did not consider the question whether a suppression hearing is itself a "trial" or whether such a

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the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcript thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

hearing is so much an integral part of the criminal trial that determines a defendant's innocence or guilt so as to intend either that the Act apply to such a hearing or that it not do so. In any event, the courts have consistently construed the statute literally, reading "trial" to mean "trial," and have held that under 18 U. S. C. § 3500 the pre-witness-stand statements of persons testifying at suppression hearings are not comprehended within the statements the defense is entitled to examine at suppression hearings. See *United States* v. *Giuliano,* 348 F. 2d 217 (2 Cir.), *cert denied,* 382 U. S. 946 (1965); *United States* v. *Wallace,* 272 F. Supp. 838 (SDNY 1967); *United States* v. *Cobb,* 271 F. Supp. 159, 164 (SDNY 1967); *United States* v. *Leighton,* 265 F. Supp. 27, 35 (SDNY), *affirmed,* 386 F. 2d 822 (2 Cir. 1967), *cert. denied,* 390 U. S. 1025 (1968); *United States* v. *Tane,* 29 F. R. D. 131, 133 (EDNY 1962); *United States* v. *Abrams,* 29 F. R. D. 178, 183 (SDNY 1961); *United States* v. *Rosenberg,* 157 F. Supp. 654, 661 (E. D. Pa.), *affirmed,* 257 F. 2d 760 (3 Cir. 1958), *affirmed,* 360 U. S. 367 (1959) . Our decision in *United States* v. *Foley,* 283 F. 2d 582 (2 Cir. 1960), relied, upon by appellant, is not to the contrary. In *Foley* the Government sought by mandamus to have us instruct the district judge to vacate his order providing for suppression hearing and providing for the production of documents at that hearing. We denied the petition but we read our denial as holding no more than that we left it to the discretion of the trial judge whether to order a production of documents; we do not read it to hold as a matter of law that the Jencks Act compelled disclosure to defense counsel of the pre-hearing statements of a witness who testifies at a suppression hearing.

Appellant next claims that the good faith destruction of handwritten interview notes deprived him of his rights at trial under the Jencks Act. At the close of the direct examination of each of the Government's main witnesses defendant requested and received FBI reports regarding

FBI interviews with each of the witnesses. Defendant claims, however, that under 18 U.S.C. § 3500 he was also entitled to the original handwritten interview notes of the FBI agents from which the reports were made. At a voir dire examination the agents testified that, pursuant to the practice they customarily follow, they destroyed their notes in good faith after incorporating them into typewritten reports. Under the circumstances, we find no violation of § 3500. The case law amply supports our ruling. Absent an indication that the notes were destroyed for an improper purpose or that the handwritten data was not preserved in the formal reports the reports satisfy the requirements of § 3500. *United States* v. *Williams,* 384 F. 2d 488, 493 (2 Cir.), *cert. denied,* 385 U.S. 836 (1966); *United States* v. *Jones,* 360 F. 2d 92, 95 (2 Cir.), *cert. denied,* 385 U.S. 1012 (1966); *United States* v. *Comulada,* 340 F. 2d 449, 451 (2 Cir.), *cert. denied,* 380 U.S. 978 (1965); *United States* v. *Aviles,* 337 F. 2d 552, 559 (2 Cir. 1964); *United States* v. *Greco,* 298 F. 2d 247, 250 (2 Cir.), *cert. denied,* 369 U.S. 820 (1962); *United States* v. *Thomas,* 282 F. 2d 191, 194 (2 Cir. 1960); *United States* v. *Baker,* 358 F. 2d 18 (7 Cir.), *cert. denied,* 385 U.S. 869 (1966); *Ogden* v. *United States,* 323 F. 2d 818 (9 Cir. 1963), *cert. denied,* 376 U.S. 973 (1964).[11a]

Appellant, however, argues that § 3500 does not contain any "good faith exception," citing *Lee* v. *United States,* 368 F. 2d 834, 837-838 (D. C. Cir. 1966) and *United States* v. *Lonardo,* 350 F. 2d 523, 529 (6 Cir. 1965). Both cases are distinguishable. In *Lee* the court's statement that "the Jencks Act does not embody in terms any 'good faith' exception," 368 F. 2d at 837, must be read in conjunction with the court's explicit statement distinguishing *Lee* from cases like the one here where the destroyed notes were "incor-

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[11a] See also *Alexander* v. *United States,* 336 F. 2d 910 (D. C. Cir.), cert. denied, 379 U. S. 935 (1964); *Augenblick* v. *United States,* 377 F. 2d 586 (Ct. Cl. 1967); *Killian* v. *United States,* 368 U. S. 231, 242 (1961).

porated into documents which were produced for the defense." *Id.* at 838, n. 7.[12] And in *Lonardo* the court's holding that the failure to produce interview notes was a violation of § 3500 was carefully restricted to apply when the notes are deliberately destroyed by an FBI agent on the eve of trial and substantial differences between the content of the notes and that of the formal interview report are evident.

Appellant also contends that he was entitled to the federal income tax returns of the Government's main witnesses as "statements" of the witnesses within the meaning of 18 U.S.C. § 3500(e)(1). While there is no decision on point, the argument is unpersuasive. The filing of the returns of the witnesses was unconnected with the investigation of Covello's activities or the criminal proceedings initiated against him, and the returns were filed with an entirely separate federal agency. Although it is the privilege of defense counsel in run-of-the-mill situations to decide whether examination of requested material would advantage the defense, here it seems clear that these income tax returns could not have been in any way helpful. Each witness admitted that he had not reported any income he received from gambling activities, and, as the witnesses had testified they had gambled, these confessions were the most Covello could have hoped to extract from them, for the only purpose the returns could have been used for was that of impeaching the credibility of the makers, see *Rosenberg* v. *United States,* 360 U.S. 367 (1959). Therefore, we do not rule upon the issue appellant would have us rule upon but state that under the circumstances here it would not appear to have been error to have withheld the returns; but, if error, the error did not prejudice the defense in any way.

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[12] The deliberate delay by the police between offense and arrest in *Lee* was another factor influencing the Fifth Circuit's decision. 368 F. 2d at 837.

Covello's final Jencks Act contention is that the court below erred in refusing to direct the Government to turn over to the defense numerous excerpts from FBI reports of statements made by the Garfinkels. After an *in camera* inspection the trial judge ruled that the requested materials bore no relation to the subject matter of the Garfinkels' direct testimony. These withheld materials were sealed for our review of the challenged ruling. The question of whether a statement or transaction falls within § 3500 is ordinarily a question of fact to be determined by the trial court, only reviewable by us within the limits of the clearly erroneous standard. *United States* v. *Sten*, 342 F. 2d 491, 493-494 (2 Cir.), *cert. denied*, 382 U.S. 854 (1965); *United States* v. *Birnbaum*, 337 F. 2d 490, 497 (2 Cir. 1964); *United States* v. *Cardillo*, 316 F. 2d 606, 616 (2 Cir.), *cert. denied*, 375 U.S. 822 (1963); *Hayes* v. *United States*, 329 F. 2d 209, 220 (8 Cir.), *cert. denied*, 377 U.S 980 (1964); cf. *Campbell* v. *United States*, 373 U.S. 487, 492-493 (1963); *Palermo* v. *United States*, 360 U.S. 343, 354 (1959).

We have examined the sealed statements and we hold that the trial court did not commit error. In essence the withheld materials related to the Garfinkels' knowledge of the gambling activities of persons other than the defendants. While the information contained in these materials may have been employed by defense counsel to show that the Garfinkels, whose "betting line" activities they had themselves testified to, were engaged in the business of bookmaking, it is clear that the information the trial judge withheld was not sufficiently relative to the subject matters the witnesses had testified about to fall within limits of demandable material Congress had carefully delineated in 18 U.S.C. § 3500; and if the defense demand had been complied with the judge would have exceeded the statutory proscription embodied within 18 U.S.C. § 3500(b). See note 11, *supra*.

IV.

Validity of the Indictment

The Government's four main witnesses, Merrill and Howard Garfinkel, Seid, and Conour, did not testify before the grand jury that returned the original indictment or the grand jury that returned the superseding indictment. Though these witnesses were available to be called the only evidence presented to either grand jury was hearsay testimony by FBI agents who related statements made to officers by Merrill Garfinkel and Conour. This was discovered by the defense at trial and appellant, attacking the validity of the indictment, moved in arrest of judgment. This motion was denied. We affirm. In *Costello* v. *United States,* 350 U.S. 359 (1956) the Supreme Court held that an indictment based exclusively on hearsay need not be dismissed. See also *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400 (1958). Though we have recently voiced our disapproval of indictments grounded totally on hearsay where the witnesses whose information was related to the grand jury by others were available to testify in person, we have never quashed an indictment for this reason. *United States* v. *Umans,* 368 F. 2d 725, 730 (2 Cir. 1966), *cert. dismissed as improvidently granted,* 389 U.S. 80 (1967); see *United States* v. *Beltram,* 388 F. 2d 449, 451 (2 Cir.), *cert. denied, sub nom. Colon* v. *United States,* 391 U.S. 955 (1968); *United States* v. *Andrews,* 381 F. 2d 377 (2 Cir. 1967), *cert. denied,* 390 U.S. 960 (1968); cf. *United States* v. *Payton,* 363 F. 2d 996, 998-999 (2 Cir.), *cert. denied,* 385 U.S. 993 (1966).

Appellant contends that, irrespective of the state of the authorities, the case before us is distinguishable from *Costello* and the cases following *Costello.* He claims that here the hearsay evidence presented to the grand jury did not sustain all elements of the offense for which appellant was indicted. In particular, he asserts no evidence was given to the grand jury concerning the specific telephone calls on

which each of counts 2 through 16 was predicated. We have examined the grand jury minutes and find defendant's charge entirely without substance. The grand jury heard specific testimony relative to each telephone toll call alleged in the Government's bill of particulars, as well as to many other calls also.

V.

Electronic Eavesdropping

Appellant next claims that his motion to suppress the fruits of an electronic eavesdropping upon calls to OR 6-1730, the phone number upon which counts 2 through 6 were predicated, was improperly denied below. The contention is premised on the disposition of the case of *United States* v. *Borgese*, 235 F. Supp. 286 (SDNY 1964), *conviction vacated*, 372 F. 2d 950 (2 Cir. 1967), in which the defendant Borgese claimed the Internal Revenue Service had illegally eavesdropped on his telephone calls to OR 6-1730 and in which after more than three years the judgment of conviction was vacated when the United States Attorney ascertained and advised this court that there had been governmental *unlawful wiretapping*. The claim that there was an unlawful *electronic surveillance*, therefore, was left unresolved in the *Borgese* case although such a claim was a main thrust of the arguments upon appeal.

The court below, after holding an evidentiary hearing at which four government agents testified, denied the motion to suppress, and found that no evidence in the case at bar was derived as a result of the eavesdropping in the *Borgese* case. The trial judge found that "the FBI developed this case independently and without knowledge or use of any evidence obtained by the Internal Revenue Service in the *Borgese* case . . . including the fact that Borgese used or called ORange 6-1730 or any other evidence," and therefore he saw no need to determine the validity of the eavesdropping, if any there were, involving activities and com-

munications of either Borgese or the present appellant, Covello.[13]

As far as we can tell, the Government has never admitted, and the defense has never shown, that there ever had been any electronic "bugging" of the appellant's conversations. Absent a revelation of monitoring activity, Covello's reliance on *Black* v. *United States,* 385 U.S. 26 (1966), vacating and remanding 353 F. 2d 885 (D.C. Cir. 1965), in which certiorari was initially denied, 384 U.S. 927, but granted upon rehearing, 384 U.S. 983 (1966), and *O'Brien* v. *United States,* 386 U.S. 345 (1967), which he offers to support his claim that he is entitled to a new trial is misplaced. In both of these cases the Supreme Court vacated judgments or conviction only after the Solicitor General *voluntarily* advised the Court that conversations in which the defendants participated were overheard and intercepted through use of concealed monitorial devices.

Appellant further requests that the Government state whether there has been any electronic eavesdropping or wiretapping upon him by any government agency. He also requests that, if necessary to obtain a compliance, the Government be judicially directed to divulge this information. The trial court ruled that whether action was to be taken upon this request was a matter for the Government, in its discretion, to decide, and not a subject for a court order. While it seemed to us unlikely that a defendant, on whom the burden of proof lies at a suppression hearing, might reasonably be able to uncover the existence of an electronic or wiretap surveillance other than by asking his

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[13] An individual has standing to suppress government evidence obtained through monitoring devices violative of the Fourth Amendment if the conversations overheard were those of the petitioner himself or conversations occurring on his premises, whether or not he was present or participated in these conversations. *Alderman* v. *United States,* 37 U. S. L. Week, 4189 at 4192 (March 10, 1969).

adversary to tell him of it,[14] for the purposes of this case we have not undertaken the task of evaluating the merits of the ruling below. Instead, we have endeavored to elicit, from the Department of Justice, a response to appellant's question. The Department courteously cooperated and the essential parts of our correspondence are set forth below.

On February 15, 1968 on behalf of the panel I wrote the following letter to Robert M. Morgenthau, United States Attorney for the Southern District of New York:

> "The panel of Judges Waterman, Feinberg and Bartels have discussed the above case, and, in view of the proceedings in U. S. v. Schipani and U. S. v. Borgese with which you are so familiar, and in view of statements recently made by the Attorney General of the United States, we three judges, through me as the panel scrivener, desire to know whether the United States has conducted a Schipani-type review to ascertain whether there may have been monitoring that might have affected the trial.
>
> "We think we should be informed of whether such a review has been conducted, is now in progress or is contemplated before we consider further the issues presented to us for resolution."

The subsequent correspondence of the parties with us we have treated as supplemental briefs *post-argument.*

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[14] In Title III, § 802, of the Omnibus Crime Control and Safe Streets Act of June 19, 1968, Pub. L. 90-351, 18 U. S. C. A. §§ 2510-2520, there are now provisions that would seem to assure that a defendant would know before his trial whether his conversations had been intercepted by government agents and in most cases what the intercepted conversations contained. In the usual case he would at the very latest be armed ten days before trial with this knowledge and would have an opportunity to suppress the evidence before trial. 18 U. S. C. § 2518(8)(d), (9), (10).

On February 27, 1968 Mr. Morgenthau replied as follows:

> "The Department of Justice, as it indicated to the Supreme Court in the case of *Schipani* v. *United States*, has undertaken an extensive review to identify any instances of unlawful electronic surveillance affecting a case which has been brought to trial.
>
> "Such a review has been conducted with respect to the above-captioned case of Joseph Covello. The Department of Justice has no information indicating that conversations of Joseph Covello were at any time overheard by unlawful electronic surveillance."

Thereafter, defense counsel, interpreting the above reply, suggested that the review undertaken by the Department of Justice was insufficient and that an adversary hearing in the district court to determine whether there had been electronic surveillance was still necessary. He advanced four grounds in support of his position, none of which appear to us to have merit for we fail to preceive how an additional hearing would further illumine the problem.

Appellant first objects to the United States Attorney's February 27 letter on the ground that the question of the "lawfulness" of any electronic eavesdropping is not properly a matter for ex parte determination by the Justice Department. This object is adequately disposed of by a subseqent communication from the United States Attorney's office. In this later correspondence, in reply to a letter of defense counsel inquiring whether the Schipani-type review the Department had conducted included an examination of the recordings and records of the monitoring that was done in the case of *United States* v. *DeCavalcante*, Criminal No. 111-68 (D.N.J. April 16, 1968), the Government flatly and unequivocally stated that "Mr. Joseph Covello . . . had not been a subject of direct microphone surveillance nor were any of his conversations

monitored by any electronic device."[15] In *DeCavalcante* the prosecution conceded that premises which the defense now asserts Covello frequented on numerous occasions had been under microphone surveillance. The recent Supreme Court pronouncement in *Alderman* v. *United States,* 47 U. S. L. Week 4189 (March 10, 1969) denying a defendant standing to suppress evidence derived from the electronic surveillance of other persons, including the defendant's codefendants and coconspirators, eliminates a second claim that Covello is entitled to have the Government disclose that very information. See note 13, *supra.*

As for the last two grounds urged to demonstrate that the Schipani-type review has been insufficient, we agree with appellant that, despite all the correspondence that has transpired in this case while it has been *sub judice,* there remains the possibility that a federal agency other than the FBI, such as the IRS, or state or local authorities, may have engaged in eavesdropping activities affecting Covello's privacy, and that such possibilities have not been foreclosed. But we feel assured that if any monitoring of defendant has taken place by any agency other

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[15] This statement was contained in a letter of July 17, 1968 from the Chief of the Department of Justice, Organized Crime and Racketeering Section, to U. S. Attorney Morgenthau and delivered by him to the panel with his enclosing letter of July 31, 1968. A fuller excerpt from the letter follows:

> "We have previously advised you that we had made inquiry as to Mr. Joseph Covello and that a review of the records revealed that he had not been a subject of direct microphone surveillance nor were any of his conversations monitored by any electronic device. Based upon the information contained in the enclosed letter of Williams & Connolly we inquired further of the Federal Bureau of Investigation referring them specifically to the installations referred to in the enclosed letter. We have just been notified that these locations had been taken into consideration in the previous review in this matter and Covello could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations."

than the U. S. Department of Justice, the monitoring *was not known* to the prosecution when Covello stood trial and that no information was obtained from any electronic surveillance of anyone's activities that was of value to the Government in connection with the case against Covello to taint the evidence the Government introduced at his trial.

Covello additionally submits that he should be granted another adversary hearing on his motion to suppress in order to cross-examine the FBI agents who monitored the electronic surveillance involved in the *DeCavalcante* case, discussed *supra*, and thereby to verify the assertions made by the FBI to the United States Attorney's office. See note 15 *supra*. Furthermore, for purposes of such hearing, relying upon *Baker* v. *United States*, 401 F. 2d 958 (D. C. Cir. 1968), appellant contends "that the logs kept by the agents who conducted the monitoring (and the recordings made if they are still in existence), insofar as these contain voices not identified by the agents, should be produced for inspection by appellant and his counsel to see if they can identify the conversation as one in which the appellant participated or which relates to the subject matter of the indictment." [16]

Appellant argues that inasmuch as the prosecution in the *DeCavalcante* case has admitted the installation of microphonic devices at two specific New Jersey locations his case should be remanded to the district court for a hearing on the eavesdropping issue. He points out that he lives in New Jersey and that on numerous occasions during the time of the electronic surveillance directed at DeCavalcante he was present at the "bugged" premises. The Government assures us that the Schipani-type review conducted at our request included a review of the eavesdropping directed against DeCavalcante, and we refuse to

[16] From September 19, 1968 letter of Attorneys Williams & Connolly to the panel in response to the letter of the United States Attorney of July 31, 1968. See note 15, *supra*.

subscribe to the need for a hearing; otherwise we would enable any defendant each time an eavesdropping of a location is disclosed subsequent to his trial to assert he was present at that location sometime during the "bugging" and thereby be entitled to a suppression hearing.

Nor are we persuaded that the holding in *Baker* v. *United States, supra,* aids the appellant in his quest for a hearing. Prior to the hearing in *Baker* the Government had made available to the defense all logs of conversations in which appellant Baker had been identified by the monitors as a participant or as having been present but did not make available any logs of conversations involving only unidentified persons. The Court of Appeals for the D. C. Circuit reversed this aspect of the district court ruling which had been in favor of the Government and remanded for another adversary hearing before which appellant Baker could inspect the logs of conversations of these unidentified persons. The Court stated:

> Inasmuch as the Government admitted both that it had overheard appellant's conversations through the Levinson and Sigelbaum devices and that it had intercepted other conversations involving unidentified persons, and in view of appellant's testimony that he had engaged in numerous conversations that might have been overheard through those devices, the possibility of appellant's having standing as to one or more of the undisclosed conversations was neither remote nor insubstantial. Certainly appellant was the person best qualified to ascertain whether any of the unidentified conversations was his, and the court's *in camera* examination of the logs, however, diligent and careful, was hardly an adequate substitute, in these circumstances, for an adversary proceeding. 401 F. 2d at 984.

Our case is quite dissimilar. Baker's voice was concededly identifiable when the recordings were played back, and so the Court of Appeals held that the defense was entitled to

hear all recordings of all voices made at the premises. Here no recording of Covello's voice was used or to be used against him. Covello seeks to detect whether a mystery voice recorded by devices employed to record the conversations of others than he could have been his voice. We find this broad difference in the two situations to be of controlling significance.

Nor does the recent Supreme Court ruling in *Alderman* v. *United States, supra,* extending the right of defendants to see transcripts of illegally monitored conversations have any bearing upon a judicial determination relative to whether one may also have the right to a suppression hearing. The rules set forth in *Alderman* do not become operative unless there is an admission by the Government that a pertinent electronic eavesdropping had occurred.

Finally, appellant contends that his character was improperly placed in issue and that the Government did not confine its proof to the bill of particulars. We find these contentions unpersuasive.

Accordingly the judgment of conviction is affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of March one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
Circuit Judges,

HON. JOHN R. BARTELS,
District Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

JOSEPH COVELLO, a/k/a Demes, *Defendant-Appellant*,

THOMAS MOLINARO, a/k/a JELLY BEAN, ET AL.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Order Inviting Response to Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of April, one thousand nine hundred and sixty-nine.

Present:

HON. STERRY R. WATERMAN,
Circuit Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH COVELLO, a/k/a Demes, *Defendant-Appellant,*

THOMAS MOLINARO, a/k/a JELLY BEAN, ET AL.,
Defendants.

It is hereby ordered that the appellee may file an answer to the appellant's petition for rehearing on or before Monday, May 5, 1969.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

31293

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH COVELLO, a/k/a DEMES, *Defendant-Appellant,*

THOMAS MOLINARO, a/k/a JELLY BEAN, ET AL., *Defendants.*

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

.....
Sterry R. Waterman

.....
Wilfred Feinberg U.S.C.JJ.

.....
John R. Bartels, U. S. D.J.

May 15, 1969

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1969. A petition for rehearing was denied on May 15, 1969. The petition for a writ of certiorari was filed on June 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, after an evidentiary hearing, properly ruled that the case against petitioner which had been developed by the F.B.I. was not tainted by the fact that Internal Revenue Service agents

had eavesdropped on a telephone booth when telephone calls were made by another person then under investigation to a telephone number used by petitioner.

2. Whether, in light of testimony of Internal Revenue Service agents that they had not transmitted information obtained by eavesdropping to the F.B.I., the court erred in not requiring the government to produce all reports of the investigation made by an F.B.I. agent who testified at a pretrial hearing that the F.B.I. had not received such information and who described the general nature of his investigation.

3. Whether the court of appeals should have remanded the case to the district court for an evidentiary hearing on petitioner's claim that he was present on premises of another which had been subjected to an electronic surveillance where the government has stated that it had never identified petitioner either as a participant in any conversation monitored or as being present during such a conversation.

4. Whether the trial court properly exercised its discretion under the Jencks statute, 18 U.S.C. 3500, (1) in refusing to strike the testimony of government witnesses on the ground that handwritten interview notes of F.B.I. agents were not produced where the notes had been incorporated into typewritten interview reports that were produced at the trial and (2) in finding that portions of statements of two government witnesses did not relate to the subject matter of their trial testimony.

5. Whether the federal income tax returns of a witness are subject to inspection on demand of a

defendant in a criminal case after the witness testifies on behalf of the government.

6. Whether the court should dismiss the indictment on the ground that it had been returned on the basis of hearsay evidence.

STATEMENT

Petitioner and three others were charged in an indictment returned in the United States District Court for the Southern District of New York with federal gambling offenses in violation of 18 U.S.C. 1084 and 1952 and with conspiracy to commit such offenses. Following a jury trial, petitioner was convicted.[1] On March 22, 1967, he was sentenced to concurrent terms of imprisonment for three years on each of three counts and two years on each of the remaining five counts on which he was convicted.

1. The sufficiency of the evidence is not in dispute. Briefly, it showed that Merrill Garfinkel supplied betting information known as the "line" (the betting odds on particular sporting events) to six or seven customers. Petitioner, one of his customers, paid Garfinkel $50 a week for this service (A. 138–140, 205–206).[2] On a daily basis, from the summer of 1961 until June 1963, Garfinkel telephoned the "line" to petitioner or one of his associates at three succes-

[1] The court acquitted one of the defendants (Nappi) at the close of the government's case. The other two defendants (Restaino and Molinaro) were convicted by the jury but did not appeal.

[2] We are lodging with the Clerk of this Court a copy of the appendix filed by petitioner below. References in the form "A" are to that appendix.

sive telephone numbers in New Jersey (A. 141–142, 148, 152, 160–164, 166–167). Garfinkel also wagered between $50 and $100 a day with petitioner on various sporting events. (See, *e.g.*, A. 145.) On occasion, Garfinkel also placed bets with New York bookmakers for petitioner (A. 149–150, 178–179). Ordinarily petitioner and co-defendant Molinaro paid Garfinkel for supplying the "line" and settled their wagers at different locations in the New York area (see, *e.g.*, A. 149, 153). When Merrill Garfinkel went on vacation for several weeks in the winter of 1962 and 1963, his "line" was disseminated by his brother Howard Garfinkel (A. 150–151, 162–163, 244–249).

Merrill Garfinkel introduced Herbert Seid, a belt salesman, and Vincent Conour, a school teacher, to petitioner's telephone number (A. 154). Initially Seid wagered infrequently with petitioner and settled his wagers through Merrill Garfinkel. Later, after Seid intensified his wagering activities to from $50 to $150 per event, he settled personally with co-defendant Molinaro. On one occasion this was done in the presence of petitioner (A. 284–289). Conour, a statistician who kept extensive records of his wagering activities, began betting with petitioner in April 1962. In May 1962, after Conour had won $5,123, petitioner and Molinaro paid him $123 and asked him to discontinue betting until they could pay him the remaining $5,000 (A. 296–305). Several days later, Molinaro took Conour to an apartment in New Jersey to see petitioner. There petitioner showed Conour the way he operated and introduced him to "Johnnie", the person who

usually took Conour's calls on baseball games (A. 305–308). Subsequently Conour again wagered with petitioner. He won a total of $14,510 by the end of the baseball season (A. 308–310). In the spring of 1963, after Conour made several efforts to collect his winnings, petitioner said "'Teach, don't ever ask me for money again * * * I will have your head bashed in'" (A. 311).

2. One of the telephone numbers that Merrill Garfinkel called when he supplied information or wagered with petitioner was OR 6–1730 (see, *e.g.*, A. 152). This telephone number was assigned to the apartment in New Jersey where Conour had visited petitioner (A. 306). This number had also been called by one Pasquale Borgese, a defendant in another federal wagering case involving transactions unrelated to petitioner's case. Prior to trial petitioner moved to suppress evidence, claiming that the prosecution against him derived from the fact that on September 20, 1962, Internal Revenue Service agents had eavesdropped on Borgese's telephone conversation with the number OR 6–1730 (A. 40–50).

An evidentiary hearing was held. There was no dispute that the agents had eavesdropped upon telephone conversations which Borgese made from a public telephone booth to Orange 6–1730 on September 20, 1962, and one or two occasions thereafter (A. 73). The number which was listed to one John Marsh had been ordered disconnected on November 8, 1962 (A. 110, 549). Jack Wilson, the Internal Revenue Service agent in charge of the Borgese investigation, testified

that neither he nor anyone else in the Internal Revenue Service had furnished any information with respect to the telephone number Orange 6–1730 to anyone in the FBI (A. 106).

Paul Neumann, an F.B.I. agent, testified that in January, 1963, he was assigned to investigate the use of fictitious telephone cards and to try to identify the individuals using such cards. In May, 1963, the F.B.I. received an anonymous letter identifying Merrill Garfinkel as the user of a fictitious card (A. 75–76). After conducting a surveillance of Garfinkel, Neumann interviewed him in June, 1963, and thereafter interviewed bettors. Among the persons identified after the interview with Garfinkel was petitioner (A. 76). Neumann testified that he had never conversed with the Internal Revenue Service about telephone number OR 6–1730 or petitioner's case (A. 76–77).[3] Neumann said the number OR 6–1730 was in the records of calls made on a fictitious credit card when he first got the case in January, 1963, but it did not mean anything to him at the time (A. 81, 87). On September 19, 1962, the F.B.I. had received information that the Orange number had been called on September 9, 1962, by a person using a fictitious credit card (A. 113). The court directed the government to produce the letter written by Mr. Beasley, Neumann's predecessor, requesting a credit check on John Marsh, the listed subscriber to this number (A. 114–115, 126–129).

[3] At this point direct examination ended. Petitioner sought all reports dealing with the agent's testimony on direct. The government objected that this would reveal the government's whole case. The court declined to order the reports produced (A. 77–81).

The court denied the motion to suppress. It found that the F.B.I. had developed the case without knowledge or use of any evidence obtained by the Internal Revenue Service in the Borgese case (including the fact that Borgese used or called Orange 6–1730). The court found it unnecessary to decide whether electronics eavesdropping of the telephone booth used by Borgese was a violation of his constitutional rights or an invasion of a constitutionally protected area (A. 412–413).

ARGUMENT

1. Since the district court found that the evidence against petitioner was obtained by the F.B.I. from sources wholly independent of the Internal Revenue Service, the court found it unnecessary to decide the legality of the eavesdropping at the time it was conducted or petitioner's standing. This case, therefore, does not present the question "whether a person whose telephone number is called has standing to suppress the fruits of an eavesdrop that overhears only the caller's end of the conversation" (Pet. 29). Assuming arguendo both illegality and standing, the evidence at the hearing established that there was no basis for reversal of petitioner's conviction. The record is clear that the Orange number was one of those known to the F.B.I. as having been called through use of a fictitious card before September 20, 1962, when the Internal Revenue Service agents first heard Borgese call the number. The Orange number had no real significance to the F.B.I. until after they interviewed Garfinkel in May, 1963, and obtained petitioner's name and the names of the bettors. The district court prop-

erly found that the case against petitioner did not develop and was in no way the result of the eavesdropping on Borgese.

2. With respect to the question whether reports by an agent who testifies on a motion to suppress must be turned over under 18 U.S.C. 3500, the issue presented by this case is far narrower than petitioner suggests. The district court did not refuse to have the agent produce records having a direct bearing on the suppression issue, *i.e.*, the knowledge and use of the Orange number. The district judge required the government to turn over to the defense the records relating to that number, the request for investigation in September, 1962, and the anonymous letter of May, 1963. Moreover, during the testimony of an internal revenue agent on the motion to suppress, the government turned over to petitioner its records of the overheard conversation and other records made by the Internal Revenue Service agents during their investigation of Borgese (A. 98–101, 106–107).[4] All that the district court denied was the defendants' request for the production of the reports of F.B.I. agent Neumann after he testified on direct that he interviewed

[4] Petitioner's attorneys here were the same attorneys that had represented Borgese. In the *Borgese* case, all government agents involved in the surveillance of the public telephone booth, testified and the court permitted cross-examination with material ordered turned over to the defense under the Jencks Statute, 18 U.S.C. 3500. See *United States* v. *Borgese*, 235 F. Supp. 286 (S.D.N.Y.), reversed on other grounds, 372 F. 2d 950 (C.A. 2).

Garfinkel and numerous other people after receipt of the anonymous letter of May, 1963.[5]

The court below properly held that the Jencks Act does not apply automatically on a motion to suppress, and that the matter of production on such a motion rests in the discretion of the court hearing the motion. The practice followed in hearings before trial on suppression motions under Rule 41 F.R. Cr. P., like other motion practice, has never been equivalent to the practice followed in the trial on the merits. Affidavits, for example, may sometimes be used. See *Baker* v. *United States,* 401 F. 2d 958, 979–980 (C.A.D.C.). This Court itself has long recognized that the issues presented in a suppression inquiry may be handled differently because they are collateral to the trial. Thus, in *Nardone* v. *United States,* 308 U.S. 338, 341, this Court held that a suppression proceeding may be a "closely confined" inquiry. More recently, in *Alderman* v. *United States,* 394 U.S. 165, 185, while holding that the defense was entitled to examine records of illegally overheard conversations, this Court said:

> None of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to

[5] Some of his reports relating to statements of Merrill Garfinkel were turned over at the trial.

nothing else. Whether this is the case or not must be left to the informed discretion, good sense and fairness of the trial judge. See *Nardone* v. *United States,* 300 U.S. 338, 341–342 (1939).

Cf. *Harris* v. *Nelson,* 394 U.S. 286.

Neither the language nor history of the Jencks Act indicates that Congress intended conformity between motion practice and the trial on the merits. The statute in specific terms provides that no statement shall be the subject of discovery until after a government witness has testified on direct examination "in the trial of the case." And, as the court below pointed out, suppression hearings were not alluded to in the legislative history. This case illustrates why the question of production on a motion to suppress should be left in the realm of discretion. There was no reason here to allow petitioner to review the reports of all the interviews conducted by agent Neumann after May, 1963, even though on direct the agent described generally the nature of his investigation. On the other hand, as to the Orange number, which was at the core of the motion to suppress, the court could and did make certain that petitioner was given all relevant documents.

3. In the court of appeals, petitioner requested that the government reveal whether there had been any electronic surveillance or wiretapping of him by any government agency.[6] The United States Attorney, at

[6] A similar motion had been denied in the district court (A. 269).

the request of the court of appeals, advised that the Department of Justice had no information indicating that conversations of petitioner "were at any time overheard by unlawful electric surveillance" (Pet. App. 22a). After the government revealed in the case of *United States* v. *DeCavalcante,* Criminal No. 111–68 (D.N.J.), decided April 16, 1968, that conversations of DeCavalcante had been monitored at DeCavalcante's place of business and at a particular location in Mountainside, New Jersey, petitioner stated he was on the two premises during the periods in which the monitoring occurred. The government, in response, stated that a review of its records revealed that petitioner had not been a subject of direct microphone surveillance nor were any of his conversations monitored by any electronic device. It also stated that the two locations mentioned had been taken into consideration and that petitioner "could not be identified as being present at or a participant in any conversations monitored by electronic devices at these locations" (Pet. App. 23a).

The court of appeals correctly held that further adversary proceedings in the district court were not required to determine if the government's case against petitioner was tainted. As pointed out above, the district court, after hearing evidence that the case developed from the government's investigation of Merrill Garfinkel, had previously concluded that the case was not tainted. When petitioner on appeal alleged that he was present in two premises in which the government had admitted monitoring conversations of DeCavalcante, the government unequivocally denied

that it had overheard petitioner. As this court said in *Taglianetti* v. *United States*, 394 U.S. 316, 317:

> Nothing in *Alderman* v. *United States*, *Ivanov* v. *United States*, or *Butenko* v. *United States*, *ante*, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance. * * *

4. The trial court did not err in its ruling at the trial on petitioner's motions under the Jencks Act:

(a) On the termination of direct examination the government furnished statements of the witnesses pursuant to defense requests under the Jencks Statute, 18 U.S.C. 3500. The statements were each prepared by the F.B.I. agents who interviewed the witness and were in typewritten form. After the defense requested the original handwritten notes of the agents from which the reports were made, the court permitted the prosecution and the defense to question the F.B.I. agents who prepared the reports. The agents testified that, following their normal practice, they transcribed their handwritten notes into a typewritten report within five days of each interview, that the typewritten report incorporated the statements contained in the original notes and that as soon as the original report was proofread, the handwritten notes were destroyed (A. 223, 230–231, 358–359). After hearing testimony, the trial judge denied a request to strike the testimony of the various government witnesses on the ground that the handwritten interview notes of the F.B.I. agents should have been preserved for production at the trial (A. 413). There is no reason to believe that the handwritten notes would have been more

useful than the typewritten reports which were given the defense counsel. As the Court said in *United States* v. *Comulada,* 340 F. 2d 449, 451 (C.A. 2), certiorari denied, 380 U.S. 978:

> There is nothing in 18 U.S.C. § 3500 which requires that all memoranda made in the course of an investigation should be kept and preserved * * *. Indeed, every consideration of efficiency and economy would seem to require the destruction of such fragmentary memoranda as soon as they are no longer needed.

See also *United States* v. *Williams,* 384 F. 2d 488, 493 (C.A. 2), certiorari denied, 385 U.S. 836; *United States* v. *Jones,* 360 F. 2d 92, 95 (C.A. 2), certiorari denied, 385 U.S. 1012.

(b) When the defense requested Jencks Act statements of witnesses Merrill and Howard Garfinkel, the government turned over certain statements and submitted other statements to the court. After an *in camera* inspection the trial court turned over an additional portion of one statement to the defense and ordered the balance of the statements sealed on the ground they did not relate to the direct examination (A. 199, 202–203, 253–255). In all, petitioner received all or part of 12 of 17 statements made by the Garfinkels. The court below, after examining the material, described it as statements of the witnesses relating to the Garfinkels' knowledge of the gambling activities of persons other than the defendants (Pet. App. 17a).

Petitioner argues (Pet. 23–24) that, since the court of appeals said that the materials might have been employed by defense counsel to show that the Garfinkels were in the business of bookmaking, it was error to

deny him the sealed exhibits because he could have used such exhibits to demonstrate that Merrill Garfinkel was the bookmaker and petitioner was the customer when the two wagered. But the fact that the Garfinkels had knowledge of the gambling activities of persons other than the defendants was no secret at the trial. Indeed, the Garfinkels were admittedly in the related business of supplying a betting line to bookmakers. Merrill Garfinkel also testified both on direct and cross-examination that he frequently placed bets with New York bookmakers on petitioner's behalf. Indeed Merrill Garfinkel admitted that in such situations, petitioner was the customer and the other party was the bookmaker. Moreover, Garfinkel introduced Herbert Seid and Vincent Conour to petitioner as bettors and at times Seid settled his bets through Garfinkel. In these circumstances it was not error for the trial court to refuse to order disclosure of the Garfinkels' statements about the gambling activities of others. See *Palermo* v. *United States,* 360 U.S. 343, 353.

The decision below does not conflict with *Ogden* v. *United States,* 303 F. 2d 724, 740 (C.A. 9), where the court described the test for production of statements as "whether the omitted portions of the statement 'may be material to the preparation' of proper cross-examination." When the court below said (Pet. App. 17a) that "the information the trial judge withheld was not sufficiently relative to the subject matters the witnesses had testified about to fall within limits of demandable material Congress had carefully delineated in 18 U.S.C.

§ 3500," it was in effect saying that the statements were not material to proper cross-examination.

(c) Petitioner was not entitled to examine as of right the federal income tax returns of the government's witnesses as a "statement" made to "an agent of the Government." At the time Congress enacted the Jencks Statute in 1957, the confidentiality of income tax returns was established by a statute providing that it was unlawful to disclose their contents except as provided by law. 26 U.S.C. 7213. The purpose of the Jencks statute was to guard against needless disclosure of confidential statements made to investigating agents while at the same time assuring a criminal defendant access to pertinent material permitting him to cross-examine government witnesses. Nowhere in the legislative history is there any suggestion Congress intended that a tax return be considered to be a statement made to an agent of the Government within the meaning of the statute. See H. Rep. No. 700, 85th Cong., 1st Sess.; S. Rep. No. 981, 85th Cong., 1st Sess. There is therefore no basis for construing Section 3500 in a manner which would undermine the confidentiality which attaches to income tax returns.

5. There is no reason in this case to reconsider this Court's ruling in *Costello* v. *United States*, 350 U.S. 359, that an indictment returned by a properly constituted grand jury is not subject to attack on the ground that it rests on hearsay evidence. This case was presented both to the grand jury that returned the original indictment and the grand jury that re-

turned the superseding indictment before the decision of the Second Circuit in *United States* v. *Umans,* 368 F. 2d 725, 730, certiorari dismissed as improvidently granted, 389 U.S. 80. In *Umans,* the court of appeals, while declining to dismiss the indictment, indicated that excessive use of hearsay would tend to undermine the function of the grand jury and suggested that hearsay evidence be used only when direct testimony was unavailable or when it was demonstrably inconvenient to summon witnesses with personal knowledge. Since *Umans* the United States Attorney for the Southern District of New York has instructed his assistants to submit to the grand jury firsthand testimony of actual witnesses except where serious practical difficulties or obstacles make this impracticable. There is, therefore, no reason to suppose that hearsay evidence is being used by that office to circumvent the production of grand jury testimony under the ruling of *Dennis* v. *United States,* 384 U.S. 855.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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AUGUST 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

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OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

One point in the Government's Brief in Opposition to Certiorari requires a reply. For in opposing the grant of certiorari on the Petition's question 1 (a)—whether the term "trial of the case" in subsection (a) of the Jencks Act includes an evidentiary hearing on a pretrial motion—the Government suggests a construction of the Act which is in direct conflict with the majority opinion of this Court in *Palermo* v. *United States*, 360 U.S. 343 (1959).

In *Palermo* the Court held that the Jencks Act's "statutory procedures are exclusive" in determining

the producibility of a Government witness' prior statements. *Id.* at 351.

> "The purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all." *Ibid.*

In the instant case, however, the Government contends that at a pretrial evidentiary hearing a Government witness' prior statement may be produced or withheld *in the Court's discretion.* (Brief in Opposition to Certiorari, pp. 8-10.)

If the courts below were correct in their holdings (80a; Pet. App. 14a)[1] that a hearing upon a pretrial motion to suppress is not "the trial of the case" within the meaning of subsection (a) of the Jencks Act, then the terms of subsection (a) expressly prohibit production at such a hearing of a Government witness' prior statement:

> "In any criminal prosecution brought by the United States, *no statement or report* in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*" 18 U.S.C. § 3500(a). (Emphasis supplied.)

[1] As in the Petition, record references are to the printed Appendix in the Court of Appeals, and the Court of Appeals' opinion is cited to the Appendix to the Petition for Certiorari.

Unless *Palermo* is to be overruled, the procedures delineated in the Jencks Act are mandatory. The Act requires production of the Government witness' relevant prior statement if his testimony at the suppression hearing is "direct examination in the trial of the case" and prohibits its production if the hearing testimony is not deemed part of "the trial of the case". *Palermo* precludes a district judge from exercising his discretion to order production of a statement whose production is not authorized by 18 U.S.C. § 3500(a).

Thus the Government's suggested construction of the Act to authorize discretionary production of Government witnesses' prior statements in itself raises an important question which should be the subject of consideration on certiorari. Whatever the merits of the Government's construction, *Palermo* should not be overruled or modified *sub silentio*.

The discretionary test for which the Government now contends to support the district judge's ruling is inappropriate for the further reason that the district judge did not apply it. The Government's apparent implication that he did apply it (see Brief in Opposition, pp. 8-9) is erroneous. The "records" which the Government notes were produced at the suppression hearing (Brief in Opposition, p. 8) were in no case sought under authority of the Jencks Act, or produced under its authority. Nor could they have been; none of them were reports or statements by the Government witness in question, Agent Neumann. Only with respect to Agent Neumann's reports[2] did

[2] An FBI agent's own report is a "statement" within the meaning of the Act. *Clancy* v. *United States*, 365 U.S. 312 (1961).

the district judge, Mansfield, J., consider applicability of the Jencks Act at the suppression hearing. Judge Mansfield's ruling was expressly based, not on the discretionary power for which the Government now contends, but on his construction of Section 3500(a):

> "The Court: Section 3500 refers to the witness testifying on direct examination in the trial of the case.
>
> I interpret that to mean—and I am referring to 3500(a)—the actual trial of the indictment.
>
> I don't construe a hearing on a motion to suppress to be a trial of the case, nor would I construe testimony of a witness on direct examination in the trial of the case to be the equivalent of the testimony of a witness on a motion to suppress. Therefore, I would deny the request for production of any material under 3500 here." (79a-80a.)

Had the district judge been employing a discretionary test such as the Government suggests, he could not have ruled the reports non-producible without even seeing what they contained. In ruling as he did without having seen the reports, which were "down in [the prosecutor's] office" (80a), the district judge plainly was not exercising a discretionary judgment but was construing the statute as a blanket prohibition against production of the reports at a pretrial hearing. Therefore, if the Government's discretionary test should be deemed correct, petitioner should at least be entitled to a remand for the purpose of having the district judge read the reports and exercise his discretion accordingly.

In the exercise of such discretion, it should not be assumed, as it apparently is by the Government (Brief

in Opposition, p. 10), that the district judge would be concerned only with Agent Neumann's reports of interviews Neumann had conducted with others following his alleged receipt of an "anonymous letter". The crucial reports for purposes of impeaching Agent Neumann's direct testimony would have been those reports of Neumann which related to his own activities rather than to his interviews of others. Agent Neumann in his direct testimony as a Government witness on the motion to suppress sought to negate any tainted leads by suggesting that his lead had come from "an anonymous letter" which accused Merrill Garfinkel of using phony telephone credit cards. (75a-77a.) But significantly, Neumann admitted that he had made no attempt to ascertain the author of this "anonymous letter". (85a.) Neumann's reports on his investigation of the phony credit card case—and there were 10 or 15 of them according to the prosecutor (80a)—would in all likelihood include references to the sources of his leads. Production of the reports might, for instance, have enabled the defense to explore on cross-examination whether the convenient "anonymous letter" was indeed from an "irate citizen" (542a), or perhaps from someone with tainted knowledge who was seeking to give Agent Neumann an independent source for otherwise tainted leads. The defense, not having seen the reports, can only speculate what they might contain. And the district judge, who was in the same position, should not be assumed to have based his ruling on speculation; he should under the Government's test be given the opportunity to see the reports on remand.

CONCLUSION

For the foregoing reasons and the reasons advanced in the Petition for Certiorari, it is respectfully submitted that the Petition should be granted.

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Dated: September 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING

Petitioner Joseph Covello prays that this Court grant rehearing of its order of October 20, 1969, denying the Petition for a Writ of Certiorari herein,[1] and that a writ of certiorari issue to review the following question, decided by the Court of Appeals but not presented in the Petition for Certiorari:

> Whether Section 605 of the Federal Communications Act of 1934, Clause 1, prohibits a telephone company from disclosing the records of a subscriber's toll calls to a law enforcement agency, in the absence of a subpoena or other valid process.

---

[1] An Order suspending the order denying the petition for a writ of certiorari, pending the timely filing and disposition of a petition for rehearing, was entered by Justice Harlan on November 4, 1969.

STATUTE INVOLVED

The Communications Act of 1934, Section 605, Clause 1, 48 Stat. 1103, 47 U.S.C.A. § 605 (1962 ed.) provides:

> "§ 605. *Unauthorized publication or use of communications*
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; . . . ."

The Communications Act of 1934, Section 605, Clause 1, as amended by the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, Title III, § 803, 82 Stat. 223, 47 U.S.C.A. § 605 (1969 Supp.) provides:

> "§ 605. *Unauthorized publication or use of communications*
>
> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than

the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority . . . ."

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The intervening circumstance which warrants rehearing is the rendition of a decision of the Court of Appeals for the Sixth Circuit, handed down September 11, 1969 and first reported in the BNA Criminal Law Reporter of October 8, 1969, which conflicts with the decision below with respect to construction of Clause 1 of Section 605 of the Federal Communications Act of 1934. The Sixth Circuit decision was rendered in the cases of *DiPiazza* v. *United States* and *Deming* v. *United States,* 6 CrL 2025, Nos. 18593-18594 (6th Cir., Sept. 11, 1969). The majority and dissenting opinions in these cases, insofar as pertinent hereto, are printed in the appendix to this petition for rehearing.

In the instant case, the Court of Appeals for the Second Circuit held, in Point I of its opinion (Appendix to Petition for Certiorari, pp. 6a-10a), that Clause 1 of Section 605 of the Federal Communications Act of 1934 did not apply to the telephone company's business records of a subscriber's toll calls—so-called "toll slips". The Court of Appeals therefore found it unnecessary to reach the question of whether an FBI

agent's informal oral request for disclosure of such records constitutes "demand of other lawful authority", within the meaning of Clause 1 of Section 605—the clause which prohibits telephone company personnel from divulging "the existence" of interstate telephone communications except under certain conditions specified in the statute:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, . . . or in response to a subpena issued by a court of competent jurisdiction, or *on demand of other lawful authority;* . . . ." 47 U.S.C.A. § 605 (1962 ed.), Clause 1. (Emphasis supplied.)

At the time that the Second Circuit's opinion was handed down, there was no other appellate decision on the application of Section 605 to toll call records, and the petition for certiorari did not raise this question for review.

In its decision of September 11, 1969, the Sixth Circuit, affirming the ruling of the United States District Court for the Southern District of Ohio, held that telephone company toll records had been validly obtained by means of Internal Revenue Service summons issued under 26 U.S.C. § 7602, because the summons constituted "other lawful authority" within the meaning of Section 605, Clause 1. *DiPiazza* and

Deming v. *United States, supra,* slip opinion at pp. 5-8 (Appendix, pp. 5a-8a, *infra*). The majority held:

> "In our view the record establishes that the telephone company divulged its records to IRS in response to a demand of lawful authority as expressly authorized by 47 U.S.C. § 605." (Slip opinion at p. 7, Appendix, *infra,* pp. 7a-8a.)

The dissenting opinion of Judge Celebreeze:

> ". . . agree[s] with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act . . .
>
> "I cannot agree with the majority's conclusion that the Internal Revenue summons that were used to obtain the toll slips were 'other lawful authority' within the purview of § 605." (Slip opinion at p. 16, Appendix, *infra,* pp. 11a-12a.)

Both the majority and dissent thus differed with the holding of the Second Circuit herein, that Congress did not intend Section 605 to protect against divulgence of toll call records.

In the instant case, the toll call records were disclosed to the FBI without the issuance of any process of any Court or agency (277a-278a)[2]; and the FBI, unlike the IRS, has no power to issue process for records which it desires to examine. The Sixth Cir-

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[2] Record references are to the page numbers of the printed Appendix in the Court of Appeals.

For examples of "toll slips", see the Exhibits photographically reproduced in that Appendix (500a-527a). A "toll slip" lists information similar to that appearing on the subscriber's long distance phone bill, including the numbers and localities called, but with additional detail as to the precise time and duration of each toll call.

cuit's construction of Section 605 not only would alter the outcome of the instant case, but presents a conflict between the Circuits concerning a question of general importance to the administration of federal criminal justice: the validity of the longstanding practice of the FBI in securing records of subscribers' toll calls from the telephone company, by informal request and without legal process.

The likelihood that this FBI practice is widespread is suggested by the convenient arrangement illustrated in the instant record, whereby the New York FBI office and the New York Telephone Company office are conveniently located in the same building (88a, 277a). Such juxtaposition of facilities seems unlikely to be inadvertent, or limited to the City of New York. In the instant case, the FBI agent simply went downstairs in his own building and obtained the records of the subscriber's toll calls from a telephone company secretary, who acted at the direction of a telephone company employee described as a "Special Agent of the New York Telephone Company" (277a-278a). The FBI agent was seeking the records on the basis of an alleged "anonymous letter", the source of which he did not attempt to determine (75a, 85a, 542a), so that a search warrant for the records would not have been obtainable on the basis of the information then known to the FBI agent. The instant record also shows the use in some instances of a form letter type of request to the New Jersey Bell Telephone Company for a "toll check" (on petitioner's home telephone number) in an investigation pertaining to "John Doe". (537a, 538a.)

The practices illustrated by this record represent a threat to the privacy of every telephone subscriber

who makes long distance calls. For if disclosure of a subscriber's toll call records is not prohibited by Clause 1 of Section 605, which prohibits telephone company personnel from disclosing "the existence" of a telephone communication without a subpoena or "demand of other lawful authority", then the company is free to disclose such records upon any informal request of a law enforcement official, and probably upon the request of any inquiring private detective or busybody whose inquiry a telephone company employee chooses to honor.[3]

The opinions in *DiPiazza* and *Deming* v. *United States, supra,* considered the situation where a form of legal process (an IRS summons) had been issued for production of the telephone company toll records. However, on petition for rehearing in *DiPiazza* it has been asserted that the record shows other instances in which telephone company toll records were turned over to the IRS without any legal process. Application for Rehearing or Rehearing In Banc, pp. 1-4, *DiPiazza* v. *United States,* No. 18,593, Sixth Circuit, filed October 13, 1969. This petition for rehearing (still pending in the Sixth Circuit at this writing) thus presents a like factual situation to the one herein, where no legal process was issued for production of the toll call records. Whatever the outcome of the pending petition for rehearing in *DiPiazza,* it appears likely that the unsuccessful party will file a petition

[3] But if "demand of other lawful authority" in Section 605 is construed to include an informal oral request by a law enforcement agent, then such informal request could be distinguished from that of a purely private party; the latter request would be barred if such records were held to be covered by § 605, while the former request could be held within the exception for a "demand of other lawful authority".

for certiorari raising substantially the same question presented herein, as well as the closely related question of what constitutes a valid "demand of other lawful authority" within the meaning of Section 605.[4]

In another decision handed down the same day as *DiPiazza* and *Deming* v. *United States, supra,* the Sixth Circuit remanded to the United States District Court for the Eastern District of Michigan, the case of *United States and Richard Daguanno, Special Agent, Internal Revenue Service* v. *Michigan Bell Telephone Co.*, 6 CrL 2027, No. 19073 (6th Cir., Sept. 11, 1969). (The slip opinions therein are printed in the Appendix to this Petition for Rehearing, pp. 19a-24a, *infra.*) The remand was to consider whether the construction of Section 605 in *DiPiazza* v. *United States, supra,* was affected by the amendment of Section 605 by Title III, § 803, of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, which had been enacted subsequent to the District Court decision in *DiPiazza* but prior to the District Court decision in *United States and Daguanno* v. *Michigan Bell Telephone Co.* The question presented in the instant petition would also appropriately involve consideration of the effect of the amendment to Section 605 enacted by the Omnibus Crime Control and Safe Streets Act of 1968. Although the Court of Appeals for the Second Circuit stated in the instant case: "The recent amendment to 47 U.S.C. § 605 by the

[4] The instant case also will involve the issue of the meaning of the statutory language "demand of other lawful authority", if it is first held that Section 605, Clause 1, does apply to divulgence of telephone company toll records. The opinion below left open the question of whether an FBI agent's request was "demand of other lawful authority" because, the opinion held, § 605 did not cover toll call records. (Appendix to Petition for Certiorari, p. 10a.)

Omnibus Crime Control and Safe Streets Act of 1968 does not alter the substance of the original statute set forth in the text above" (Appendix to Petition for Certiorari, p. 8a, n.6), a substantial question exists as to whether Congress worded amended Section 605 so as to make it mean the *opposite* of original Section 605, Clause 1. The amended Section 605 appears by its terms to prohibit divulgence of those telephone company records covered by Clause 1 *even when they are sought by subpena or other legal process.* The amended version of Section 605 provides:

> "Except as authorized by chapter 119, Title 18, *no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof,* except through authorized channels of transmission or reception, *(1) to any person other than the addressee, his agent, or attorney,* (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, *(5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority . . . .*" 47 U.S.C.A. § 605 (1969 Supp.) (emphasis supplied).[5]

[5] The language is not misprinted in U.S.C.A. The same language appears in the bill as set forth in the Senate Committee Report, S. Rep. No. 1097, 90th Cong., 2d Sess., at 19. The language is paraphrased in the same manner in setting forth the purpose of the amendment, S. Rep. No. 1097 at 107-08.

Unless Section 605 has no application to telephone company toll records—as the Second Circuit but not the Sixth Circuit held—the language of amended Section 605 thus appears to prohibit disclosure and evidentiary use of such records even in response to process of a court or agency. Whether Congress has inadvertently or otherwise chosen language which renders the meaning of Clause 1 opposite to that of the pre-amendment language, is a subsidiary question of significant importance to the administration of criminal justice and protection of the telephone subscriber's right of privacy.

Respectfully submitted,

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Dated: November 14, 1969

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

ROBERT L. WEINBERG

APPENDIX

APPENDIX

Excerpts From Opinions of the United States Court of Appeals for the Sixth Circuit in DiPiazza v. United States and Deming v. United States.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 18593-18594

SAM (SALVATORE) DIPIAZZA, *Defendant-Appellant,*

v.

UNITED STATES, *Plaintiff-Appellee.*

WILLIAM CLYDE DEMING, *Defendant-Appellant,*

v.

UNITED STATES, *Plaintiff-Appellee.*

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided September 11, 1969.

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. DiPiazza and Deming appeal from their convictions under 18 U.S.C. §§ 371 and 1952 on seven counts of use of interstate telephone facilities for carrying on a business enterprise of gambling in violation of state law and one count of conspiracy so to carry on that business. They were found guilty on all counts by a jury after a lengthy trial before District Judge David S. Porter.

The voluminous evidence introduced by the Government established a large scale interstate illegal bookmaking and layoff gambling operation. This operation was carried on by telephone between Cincinnati, Ohio, Fort Thomas, Kentucky, New Orleans, Louisiana, and other points. Accord-

ing to the evidence DiPiazza primarily was based in New Orleans and Deming in Cincinnati. The gambling enterprise between these two defendants was shown to have exceeded $400,000 in one month.

Appellants challenge the Government's obtaining certain telephone company long distance toll card records, the Government's use of the toll records, and the sufficiency of search warrants under which the bulk of the evidence against the appellants was seized. Other errors alleged will be mentioned later in this opinion.

In January 1966 special agents of the Internal Revenue Service at Cincinnati received a communication from the Internal Revenue Office at Las Vegas, Nevada, requesting that a telephone number be checked, information having been received that it was being called by Las Vegas bookmakers. The number was determined to be located in the basement apartment at 3808 Woodford Road, Silverton, Ohio, a Cincinnati suburb.

In June, 1966 a special IRS agent at Louisville informed the Cincinnati office that an undercover agent had placed bets with a certain person who had been using two telephones in Lexington, Kentucky. From the toll records of the Woodford Road telephone it was determined that calls had been placed from that number to the two Lexington numbers.

The telephone at 3808 Woodford was listed to Harry Acker, a fictitious listing. Surveillance by IRS agents disclosed Deming to be a frequenter of the Woodford premises. Examination of telephone company toll records, obtained by IRS summons, revealed that the telephone at 3808 Woodford and the telephone at Deming's residence in Fort Thomas, Kentucky, had been and were being used to make numerous toll calls to persons known to be prominent bookmakers in various cities.

Based upon the affidavits of Special Agent Guy I. Wetherell, IRS Intelligence Division, search warrants were is-

sued. The warrant for the 3808 Woodford address was issued by a United States Commissioner for the Southern District of Ohio. The warrant for Deming's residence at Fort Thomas was issued by a United States Commissioner for the Eastern District of Kentucky.

The raid on the Woodford Road property was led by Special Agent Frank Carrington, who at the time of the trial was on a Ford Foundation grant and assigned as a legal advisor to the vice squad of the Chicago Police Department. He is a licensed attorney and a graduate of the University of Michigan Law School.

Deming was present at the Woodford address when the search warrant was executed there. A paper sack was seized containing betting records that had been torn into thousands of small pieces. More than 20,000 pieces of paper were assembled by Carrington and agents under his control. Carrington identified these reassembled documents, testifying that they included bet slips, balance sheets and "recap" sheets, all pertaining to the bookmaking and lay-off horse betting operation between Deming and other individuals, including DiPiazza. Deming conceded that each one of these reconstructed slips was written solely in his own handwriting.

A raid on Deming's residence at Fort Thomas also produced racing forms, telephone toll records and gambling paraphernalia.

The FBI raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was within the period of the conspiracy charged in the indictment. Papers taken off DiPiazza contained Deming's telephone numbers in Fort Thomas and on Woodford Road. Deming's Fort Thomas telephone had an unlisted number. It was shown in DiPiazza's papers as the equivalent of the Woodford Road telephone number. This established, in conjunction with other evidence, a connection between DiPiazza and Deming.

Toll records of the Cincinnati and Suburban Bell Telephone Company were subpoenaed and put into evidence. These are records which were maintained by the telephone company in the ordinary and normal course of its business for the Deming telephones at Woodford Road and at Fort Thomas. These records disclosed hundreds of calls, often as many as five per day, to premises occupied by DiPiazza in New Orleans, and calls to the Hilton Hotel in New York at times when DiPiazza was registered there. The search of Deming's apartment, residence and automobile produced duplicates of most of these same toll records.

We find no reversible error in the record and affirm the convictions.

(1) The Toll Records

The principal issue on this appeal is whether the Government's evidence of the telephone calls in question was secured by the wrongful procurement of the telephone records in violation of Section 605 of the Communications Act, 47 U.S.C. § 605. This question arises first with respect to whether there was probable cause for the issuance of the search warrants. It is further contended that the evidence was unlawfully introduced and received at the appellant's trial.

A.

Appellants contend that the toll records of long distance telephone calls constitute an "interception" of a message in violation of section 605.

The toll records obtained by IRS in its investigation are the same type of long distance records kept by the telephone company for all telephones. These records contain substantially the same information that is furnished each month to the customer as a part of his billing, i.e., the date of the call, the destination called, the telephone number to which each call is placed, the telephone number where the call originated, and the amount of the charge for the service. These records contain no information as to the

persons participating in the call or the subject matter of the conversation.

A telephone subscriber or user authorizes the telephone company to intercept his calls to the extent reasonably necessary for purposes of computing his telephone charges. See *Brandon* v. *United States*, 382 F.2d 607 (10th Cir.); *United States* v. *Gallo*, 123 F.2d 229 (2d Cir.); *United States* v. *Russo*, 250 F.Supp. 55 (E.D. Pa.).

> "To hold that recording by the company of the fact of a call between two of its telephones is an unauthorized interception of a communication would require a construction of the statute extending it beyond either its purpose or its words. The statute was not intended to proscribe long-standing, reasonable business practices of communication companies. When a person takes up a telephone he knows that the company will make, or may make, some kind of a record of the event, and he must be deemed to consent to whatever record the business convenience of the company requires. If by any stretch of language the making of such a record could be termed an 'interception' of the communication, it is one which the sender has authorized. Hence it is not within the ban of the statute." *United States* v. *Gallo*, 123 F.2d 229, 231 (2d Cir.).

We find nothing in the language or legislative history of 47 U.S.C. § 605 indicating any congressional purpose to preclude the telephone company from making records of long distance toll calls.

Therefore we hold that the maintenance of toll records in the routine course of business does not constitute "interception" of wire communications in violation of § 605 and is not wiretapping.

B.

Having held that the maintenance of the toll records and the making of the records does not constitute an "interception" forbidden by § 605, we now deal with the appel-

lants' contention that the submission of the records to the IRS was a "divulgence" forbidden by § 605.

Only the first clause of 47 U.S.C. § 605 could be construed as prohibiting the telephone company from turning its records over to the Government since there was no interception of a message in violation of section 605's later clauses. The clause is as follows:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, or effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or *on demand of other lawful authority;* . . ." (Emphasis supplied).

The Government maintains that the IRS summons was issued under 26 U.S.C. § 7602 and constituted "other lawful authority" for the divulgence of the toll records revealing the existence of the telephone calls. In an addendum to his findings of fact and conclusions of law on the defendants' suppression motions prior to the trial the District Judge held that the obtainingof the toll slips under the summons was obtaining them under "other lawful authority" within the meaning of section 605. Implicit in that holding is a finding that obtaining evidence for a criminal prosecution was not the sole purpose of the investigation. We find no evidence in the record to support a contention that this finding is in error. The appellants have not pointed out to this Court or to the District Court any evidence that the summons were improper. The agent who

authorized the issuance of the summons testified as a witness at the suppression hearing, but on cross-examination the appellants did not even undertake to develop any facts to show that the summonses were issued for an unlawful purpose.

Where the investigation may produce both civil and criminal evidence, the summons under section 7602 is a proper device for obtaining records. See *United States* v. *Powell*, 379 U.S. 48; *Ryan* v. *United States*, 379 U.S. 61, aff'g 320 F.2d 500 (6th Cir.). The burden is on the party objecting to the summons to show that it was used for an unlawful purpose. See *United States* v. *Powell, supra* at 58; *United States* v. *Nunnally*, 278 F.Supp. 843 (D.C. Tenn.). That burden is not met by merely showing that the agent issuing the summons is a special agent of the IRS. See *Powell* v. *United States, supra* (summons to appear before special agent); *Tillotson, Special Agent, IRS* v. *Boughner*, 225 F.Supp. 45, motion denied, 327 F.2d 982, aff'd 333 F.2d 515 (7th Cir.), cert. denied, 379 U.S. 913 (Special Agent summons with unknown taxpayer); *Mullins, Special Agent, IRS* v. *Angiulo*, 227 F.Supp. 524, aff'd 338 F.2d 820 (1st Cir.), cert. denied, 380 U.S. 963 (Special Agent summons). But see *United States* v. *Kleckner*, 273 F.Supp. 251 (S.D. Ohio), appeal dismissed on motion of appellants, 382 F.2d 1022.

It should be remembered that when the earlier summons was issued the IRS had no knowledge that Deming or DiPiazza were involved. The first name disclosed in the investigation was that of Harry Acker, who was listed as the subscriber of the Woodford Road telephone number with which the investigation was begun. At the time this summons was issued IRS could not have known what kind of violations would be disclosed by the investigation. There was a possibility that there would be a finding of civil tax liability.

In our view the record establishes that the telephone company divulged its records to IRS in response to a demand

of lawful authority as expressly authorized by 47 U.S.C. § 605. The summonses were issued in conformity with and pursuant to the authority of 26 U.S.C. § 7602. A finding that the furnishing of the toll records for Deming's telephones at Woodford Road and at his residence at Fort Thomas constituted a violation of 47 U.S.C. § 605 cannot be supported on this record.

In our opinion the decision in *United States* v. *Caplan*, 255 F.Supp. 805 (E.D. Mich.), relied upon by appellants, is distinguishable from the present case in at least two particulars: (1) that case involved the use of an unauthorized pen register, which, unlike making long distance toll records, is not an activity of the telephone company consented to by the subscriber and (2) the District Judge in that case found as a fact that the IRS summons was issued to investigate possible criminal violations and not to determine civil liability. In the present cases District Judge Porter, in the addendum to his findings of facts and conclusions of law on the motion to suppress, affirmatively found that the obtaining of the long distance toll slips in response to IRS summons was pursuant to "demand of lawful authority" as that phrase is used in 47 U.S.C. § 605.

C.

The appellants contend that the toll records could only be obtained under a search warrant, citing *Katz* v. *United States*, 389 U.S. 347, and *Hanna* v. *United States*, 393 F.2d 700 (5th Cir.). We find this contention without merit. *Katz* was an electronic surveillance case in which the Government eavesdropped on telephone conversations. The Court said, "One who occupies [a telephone booth] . . ., shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. at 352. He is not entitled to assume that the fact that he is making a call will be a secret. Similarly one who uses a telephone to make long distance calls is not entitled to assume that the tele-

phone company will require a warrant before submitting its record in response to an IRS summons.

The Supreme Court recently held that *Katz* v. *United States* is "to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967." *Desist* v. *United States,* 394 U.S. 244, 254. Any eavesdropping in the present cases occurred well before that date.

Hanna v. *United States, supra,* was a case of wiretapping by the telephone company and, although the appellants did not mention it in their briefs, was written in three opinions including a dissent. The same panel reversed itself in a unanimous opinion at 404 F.2d 405.

We find no Fourth Amendment right of the appellants violated in the summoning of the toll records.

We hold that the toll records were properly obtained by the Government and were usable both as a basis for the search warrants and as evidence at trial against the appellants.

(2) Sufficiency of the search warrants

Appellant Deming challenges the search warrants on the grounds that they are invalid under *Spinelli* v. *United States,* 393 U.S. 410, and *Aguilar* v. *Texas,* 378 U.S. 108; that they are supported by differing statements; and that there is a discrepancy between a date alleged in the statements and what was subsequently proved by the evidence. We find that the warrants were issued on a showing of probable cause and were in no way defective. The statement which is challenged recites the qualifications of the Special Agent making the statement and then recites the following facts on which probable cause was found by the District Court: The Cincinnati office of the IRS was informed in February 1966 (the date is discussed below) that suspected bookmakers in Las Vegas, Nevada were calling a Cincinnati telephone number. The Cincinnati IRS determined the name of the subscriber to the number and examined the toll records discussed above. In June

1966 the affiant was informed by another named Special Agent that a third named Special Agent had been making bets with a person in Lexington, Kentucky, by calling two numbers there. Calls had been placed from the Lexington numbers to the Cincinnati number. Calls had also been placed between the Cincinnati number and that of Sam DiPiazza, who was a nationally known bookmaker, and that of an address in Louisville, Kentucky, for which a federal wagering stamp had been issued. The affiant concluded that these telephone calls, in his judgment as an experienced investigator, showed a pattern of bookmaking operation at the Cincinnati number on Woodford Road.

The statement further recited that the Woodford Road building had been put under surveillance and that a certain automobile, registered to Deming's mother at Deming's address in Fort Thomas, Kentucky, had been observed on eight occasions outside the building and Deming had been observed driving it. Deming was known to the affiant as a bookmaker and had been arrested for wagering law violations and had at one time a wagering stamp. The toll records revealed a number of calls from Deming's home number to the two Lexington numbers at which the Special Agent had placed wagers.

Deming urges that this Court hold that there was not probable cause because the statement did not recite the name of the informer who told the IRS in Cincinnati in early 1966 that gamblers were calling the Cincinnati number.

* * * * * * * * * *

. . . We concur with the conclusion of the District Court that probable cause was shown in all the affidavits.

* * * * * * * * * *

(5) Conclusion

Other contentions made by the appellants have been considered, and we are of the opinion that they are without merit. The District Court made no error in overruling the various motions to suppress.

Affirmed.

CELEBREZZE, Circuit Judge, dissenting. I respectfully dissent. I agree with the majority that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act. The principal issue before us is whether the Government violated that section by using the § 7602 summons to obtain the telephone records that led ultimately to Appellant's convictions. If the Government did violate § 605 there was no probable cause for the search warrants. *Spinelli v. United States*, 393 U.S. 410 (1969). Without the toll records, the Government could not establish that a bookmaking network existed between Deming's telephones, DiPiazza's New Orleans telephone, and the two telephones in Lexington, Kentucky.[1] Stripped of this information, the only evidence the Government had when it went before the Commissioners was an unsupported tip from Las Vegas, Nevada, and visual surveillance which disclosed nothing more than the fact that Deming was seen near the Woodford Road apartment. The U.S. Supreme Court held in *Spinelli* that such circumstances do not establish probable cause.

I cannot agree with the majority's conclusion that the Internal Revenue summons that were used to obtain the toll slips were "other lawful authority" within the pur-

[1] I.R.S. agents also summoned toll records for telephone numbers found in Deming's telephone records, including those for two telephone numbers used by Kuhn. Kuhn was indicted along with Appellants as a co-conspirator and convicted largely on the basis of the evidence seized in the raids on Deming's premises. This Court today affirmed his conviction, No. 19,030. Kuhn's telephone numbers were the Lexington, Kentucky telephone numbers named in the affidavits supporting the search warrants. The toll records for his numbers showed a high volume of calls to Deming's telephone numbers. Appendix, pp. 155 and 157. The toll records, which were summoned well before June of 1966, established the bookmaking network alleged in the affidavits. Assuming that an I.R.S. agent did place bets with parties at the Lexington, Kentucky telephone numbers in June of 1966 as alleged in the affidavits, it was not because of his own independent investigation but because of the information contained in the toll records.

view of § 605. I am of the opinion that the record clearly establishes that Government agents used the summons for the sole purpose of procuring evidence to prosecute and convict Appellants of conspiracy to violate, and of violating federal criminal statutes. This is contrary to the U.S. Supreme Court's holding in *Reisman* v. *Caplin,* 375 U.S. 440 (1964), where the Court said that the Government could not use the § 7602 summons for that purpose.

When the Government conducts searches for evidence of crime it must proceed by lawful authority. No less is required under § 605 which embodies a congressional mandate that the privacy of telephone users shall be free from arbitrary invasion by government officials. Consequently, the U.S. Supreme Court has held that when such an invasion does take place evidence seized as a result may not be used in a criminal prosecution against the parties to the communication, in these cases, Deming and DiPiazza.[2] These holdings accord with the rule excluding evidence seized in violation of the Fourth Amendment, to which § 605 has often been equated.[3]

The record in these cases establishes that Government agents obtained the evidence which led to Appellants' indictments and convictions through an indiscriminate abuse of civil process, the § 7602 summons.

The majority opinion states that "[t]he F.B.I. raided DiPiazza's hotel room in New Orleans on January 8, 1966, which was well within the period charged in the indict-

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[2] And Kuhn in No. 19,030, *Nardone* v. *United States,* 302 U.S. 379 (1937); on second appeal, 308 U.S. 338 (1939); *Goldstein* v. *United States,* 316 U.S. 114 (1942). The term "sender" has been held to include both parties to the telephone conversation. *United States* v. *Tane,* 329 F.2d 848 (2d Cir. 1964); see *Rathburn* v. *United States,* 355 C.S. 107, 113 (1957) (Dissenting opinion of Frankfurter, J.).

[3] *Goldstein* v. *United States,* 316 U.S. 114 (1942); see generally *Katz* v. *United States,* 389 U.S. 347 (1947).

ment." It is important to note that the F.B.I. raided DiPiazza's hotel room one month before the Government received its alleged Las Vegas information concerning Deming's Woodford Road telephone number. It is also important to note that the Government admitted during the hearing on on the motion to suppress that electronic surveillance had been conducted against DiPiazza by both the F.B.I., which arrested DiPiazza, and the I.R.S., which arrested Deming, his co-conspirator.

Upon the arrest of DiPiazza on January 8, 1966, the F.B.I. obtained from his person papers containing Deming's Woodford Road telephone number. Although the I.R.S. informed the Commissioners that it summoned Deming's telephone toll records (Woodford Road) in February of 1966, supposedly at the request of its Las Vegas office, evidence developed that these toll records were summoned in January of 1966. The chronology of events in these cases emerges as follows: The F.B.I. and the I.R.S. electronically monitored DiPiazza's conversations; F.B.I. agents raided DiPiazza's hotel room in January of 1966 and seized Deming's Cincinnati, Ohio, telephone number; I.R.S. agents summoned the toll records for that number in the same month, procured search warrants on the basis of the information contained in them, and seized the evidence that led to Appellants' convictions for violating wagering statutes and for conspiring to do so.

In overruling Appellants' motions to suppress, the District Judge found that the joint F.B.I.-I.R.S. electronic surveillance did not lead to the indictments against them. He found that the Las Vegas information did. Although some argument during the hearing on the motion to suppress was devoted to the use of the § 7602 summons in obtaining the toll records, the Government did not at any time allege that the investigation conducted by its agents had civil tax ramifications.

Coming to the propriety of the Government's use of the § 7602 summons, even if we assume that the joint electronic

surveillance did not lead the Government to the evidence used to convict Appellants, which is, I believe, a highly questionable assumption, it is abundantly clear that the F.B.I. and the I.R.S. were not interested in Appellants' civil federal income tax liability. Special I.R.S. agent Wetherill, who obtained the search warrants, revealed as much during the hearing on the motion to suppress. In the colloquy that follows, Appellants' counsel was attempting to ascertain from Wetherill how he know that DiPiazza was a "nationally known bookmaker" as he had alleged in the affidavits supporting the search warrants:

"Q. Now, again I ask you what makes a suspected bookmaker?

A. Suspected bookmaker is a person that I believe to be engaged as a bookmaker.

Q. But who does not have a stamp, does not pay an excise tax and who has not been convicted; is that correct?

A. Yes, sir.

Q. Now, explain to me why you refer to Sam DiPiazza, who has not been arrested, not been convicted and who has never had a stamp as a nationally known bookmaker?. Look at your affidavit and tell me why you made such a statement.

Mr. Michael: I object to one part of the question if it said he has never been arrested. We have information to the contrary.

Mr. Johnson: May I rephrase the question, I didn't mean to say arrested.

The Court: Forget the arrested.

Q. Do you know whether or not he has ever had a stamp?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Do you know whether or not he has ever paid excise tax?

A. No, sir.

Q. Have you ever checked it?

A. No, sir.

Q. Have you ever checked whether he has ever been convicted?

A. No, sir.

Q. However, you swear he is a nationally known bookmaker?

A. For the years I have been in the Service, for these years I have been in the Service I have heard and been told that Sam DiPiazza is a bookmaker."[4]

But there is more than the subjective intent of the agents in these cases to show that this was from start to finish a criminal investigation. The I.R.S. Special Agent, like Wetherill and all of the agents who participated in these cases, does not assess civil liability. He, like his agent colleague in the F.B.I., has a far more grave responsibility:

> "A special agent is a criminal law enforcement officer and just like any state or municipal detective or policeman." N.Y.U. 20th Inst. on Fed. Tax 1081, 1087. (1962).

Congress has authorized the Commissioner of Internal Revenue to investigate both civil and criminal offenses against the revenue. The first of these functions is carried out by the revenue agent who is usually assigned to the Service's Audit Division. His job is to see that taxpayers accurately report their income and pay the tax owing on it. The special agent, on the other hand, is assigned to the Service's Intelligence Division. His function, as stated

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[4] As the U.S. Supreme Court said in *Spinelli* v. *United States*, 393 U.S. 410, 418-419 (1969), "a simple assertion of police suspicion" that someone "was known . . . as a gambler" may not provide a basis for a finding of probable cause for a search warrant nor "be used to give additional weight to allegations that would otherwise be insufficient". See *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

above, is to investigate criminal offenses against the revenue. *Wild* v. *United States*, 362 F.2d 206 (4th Cir. 1966). When a taxpayer may be subject to increased liability for taxes as well as criminal penalties, the revenue agent and the special agent will work together in a joint investigation. Thus, for example, where a revenue agent suspects fraud on the part of a taxpayer that would deprive the Government of tax dollars and possibly subject the taxpayer to criminal penalties, he will call in the special agent:

> "When a Special agent enters the picture, it is an entirely new investigation, for a new purpose, and the civil tax liability is no longer involved." NYU 20th Inst. on Fed. Tax 1081, 1087 (1962).

As mentioned above, no Revenue agent ever took part in the Government's investigation. The summoning of the telephone records, the stakeout of the Woodford Road apartment, and the seizure of all the evidence against Appellants was handled by special agents of the Internal Revenue Service whose function it is to "investigate criminal offenses against the revenue." This takes on crucial significance in light of the Supreme Court's holding that a summons authorized under 26 U.S.C. § 7602 cannot be used where the I.R.S. has for its purpose the obtaining of evidence for use in a criminal prosecution. *Reisman* v. *Caplin*, 375 U.S. 440 (1964); see *Boren* v. *Tucker*, 239 F.2d 767 (2d Cir. 1956); *United States* v. *DeGrosa*, 405 F.2d 926 (3d Cir. 1969); *United States* v. *Caplin*, 255 F. Supp. 805 (E.D. Mich. 1966).

I believe that the majority paints with too broad a brush when it says that the courts will grant enforcement to the § 7602 summons "[w]here the investigation may produce both civil and criminal evidence." The cases that the majority cite in support of that statement, namely, *United States* v. *Powell*, 379 U.S. 48 (1964), and *Ryan* v. *United States*, 379 U.S. 61 (1964), say that the Commissioner must

show that the investigation is "pursuant and relevant to" a legitimate purpose, which is, in the language of § 7602:

> "[To] ascertain the correctness of any return where none has been made, determine the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability . . . ."

I submit that none of these purposes were present here. See *Boren* v. *Tucker*, 239 F.2d 767 (9th Cir. 1956).

While courts have granted enforcement to the § 7602 summons where the investigation might lead to a criminal prosecution the thrust, purpose and scope of the investigation at the outset was to determine the liability of the taxpayer for taxes owed to the Government. *United States* v. *Kleckner*, 273 F.Supp. 251 (S.D. Ohio, 1967), appeal dismissed, 382 F.2d 1022 (6th Cir. 1967).

It is a far different thing to say as the majority does in defense of the summons issued in these cases that there was "a possibility that there would be a finding of civil tax liability." We have a deep and fundamental tradition in this country given force through our Constitution that prevents Government agents from rummaging at will into the private lives of citizens with the expectation that something useful may turn up. Accordingly, I cannot condone the sweeping use of the § 7602 summons in these cases which enabled the I.R.S. to seize knowledge of Appellants' telephone conversations. I do not believe that the executive branch of our government is entitled to wield such power, nor can I excuse its exercise here on the ground that Government agents believed that the rewards flowing from their actions would more than justify their unfettered intrusion into Appellants' private lives.

While I am in accord with the ultimate goal of law enforcement agencies in stamping out organized crime in this

country, these agencies must nevertheless proceed in a manner consistent with existing court decisions, congressional mandate, and constitutional limitations. It is my opinion that they have failed to do this.

Since it is my belief that the sole purpose of the investigation in these cases was to gather evidence for use against Appellants in a criminal prosecution, I submit that the § 7602 summons were not "other lawful authority" within the meaning of § 605 of the Communications Act. Accordingly, the information found in the toll slips could not be disclosed to the Commissioners. 47 U.S.C. § 605; *Alderman* v. *United States*, 394 U.S. 165 (1969). Without this information, the Government could not meet the standards for probable cause established in *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

I would therefore reverse.

Opinions of the United States Court of Appeals for the Sixth Circuit in United States and Daguanno v. Michigan Bell Telephone Company.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19073

UNITED STATES OF AMERICA AND RICHARD DAGUANNO, Special Agent, Internal Revenue Service, *Petitioners-Appellants*,

v.

MICHIGAN BELL TELEPHONE COMPANY, *Respondent-Appellee.*

Appeal from the United States District Court for the Eastern District of Michigan.

Decided September 11, 1969.

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

PHILLIPS, Circuit Judge. The United States and Special Agent Richard Daguanno appeal from the District Court's denial of enforcement of an Internal Revenue summons issued under authority of 26 U.S.C. § 7602. Jurisdiction in the District Court was based on 26 U.S.C. § 7604(a). The District Court denied enforcement on the ground that the summons overstepped the power given to the Commissioner of Internal Revenue.

The sole question before this Court is whether the summons was valid under 26 U.S.C. § 7602. We hold that it was.

The case was tried on stipulated facts. The District Court held that the summons "was not issued for the purpose of determining the tax liability alone, but was pri-

marily intended as a criminal investigative tool." The parties had stipulated that Daguanno was a Special Agent assigned to investigate the tax liability of a named taxpayer for the years 1961 through 1966 and that it was necessary to his investigation to examine the telephone company toll records showing long distance calls to and from the taxpayer's telephone. The toll records were records which the company maintains in the ordinary course of its business. Daguanno had the authority to issue summonses under 26 U.S.C. § 7602 and purported to issue the summons to the telephone company under that authority. The final stipulation was:

> "6. That the Michigan Bell Telephone Company refused to appear and produce the required records and has continued to refuse to produce the required records for the sole and only reason that the United States of America and Special Agent Richard Daganno have declined to assure Michigan Bell Telephone Company that the records demanded are unconnected with any criminal investigation."

Clearly the telephone company has standing in this proceeding to challenge the lawfulness of the summons. *Reisman* v. *Caplin*, 375 U.S. 440, 445. However, it bears noting in this case that officers of the government are presumed to act lawfully. *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F.2d 807, 812 (6th Cir.), cert. denied, 368 U.S. 938. When a citizen is called upon through the medium of an Internal Revenue summons to provide information from his records, the citizen has a right to assume that the officer is acting properly and within his lawful authority. See *Bohnen* v. *Harrison*, 232 F.2d 406, 409 (7th Cir.), aff'd, 345 U.S. 946 (per curiam, equally divided court).

The Government may use a § 7602 summons properly when its investigation may have both civil tax liability and

criminal ramifications. *DiPiazza* v. *United States*, — F.2d — (No. 18,593, ————, 1969); *United States* v. *Hayes*, 408 F.2d 932, 936 (7th Cir.); see *United States* v. *Powell*, 379 U.S. 48; *Ryan* v. *United States*, 379 U.S. 61. Even assuming that the District Court was correct in its determination that the summons in this case was principally to investigate for criminal liability, the summons was proper since the Court did not exclude the possibility that the summons also was to determine civil tax liability. *United States* v. *DeGrosa*, 405 F.2d 926, 928 (3rd Cir.). The Section 7602 summons is inquisitorial. *United States* v. *McKay*, 372 F.2d 174 (5th Cir.); see *United States* v. *Powell*, 379 U.S. 48, 57.

The Commissioner of Internal Revenue is entitled to enforcement of his summons when he shows:

> "[T]hat the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . ." *United States* v. *Powell*, 379 U.S. 48, 57-58.

However, the summons will not be enforced where to do so would abuse the process of the court.

> "Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined." Id. at 58.

We hold that an abuse is not shown by the fact that the government refuses to give up its right to use lawfully acquired evidence in aid of a possible future criminal prosecution.

Because of our disposition of this case we need not deal with the District Court's factual conclusion that the investigation was primarily for criminal information. We observe, however, that we find no evidence to support this conclusion. The government's refusal to give the assurance demanded by the telephone company will not support the inference of an intent to use the evidence exclusively for purposes of criminal prosecution. The records of both incoming and outgoing calls may be relevant to the question of tax liability.

This Court held in *DiPiazza* v. *United States*, —F.2d — (No. 18,593, ————, 1969), that the summons under 26 U.S.C. § 7602 is "other lawful authority" within the meaning of 47 U.S.C. § 605 and that the submission of toll records by the telephone company in response to such a summons does not violate § 605. That case was decided under § 605 as it stood prior to amendment by Title III, § 803, of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, which was enacted before the decision of the District Court in the present case. Because the District Court decided this case on the basis of its conclusion that the summons authority itself was abused, it did not reach the issue of whether under the amended § 605 the summons authorized by 26 U.S.C. § 7602 is "other lawful authority." Since the telephone company elected not to file a brief before this Court, we have neither the benefit of a District Court decision nor of adversary briefing on this issue. In view of its importance we decline to pass on this issue as a basis for possible affirmance of the District Court decision under these circumstances.

The decision of the District Court is vacated and the case is remanded for determination of the question of the effect

of the amendment of § 605 and for further proceedings consistent with this opinion.

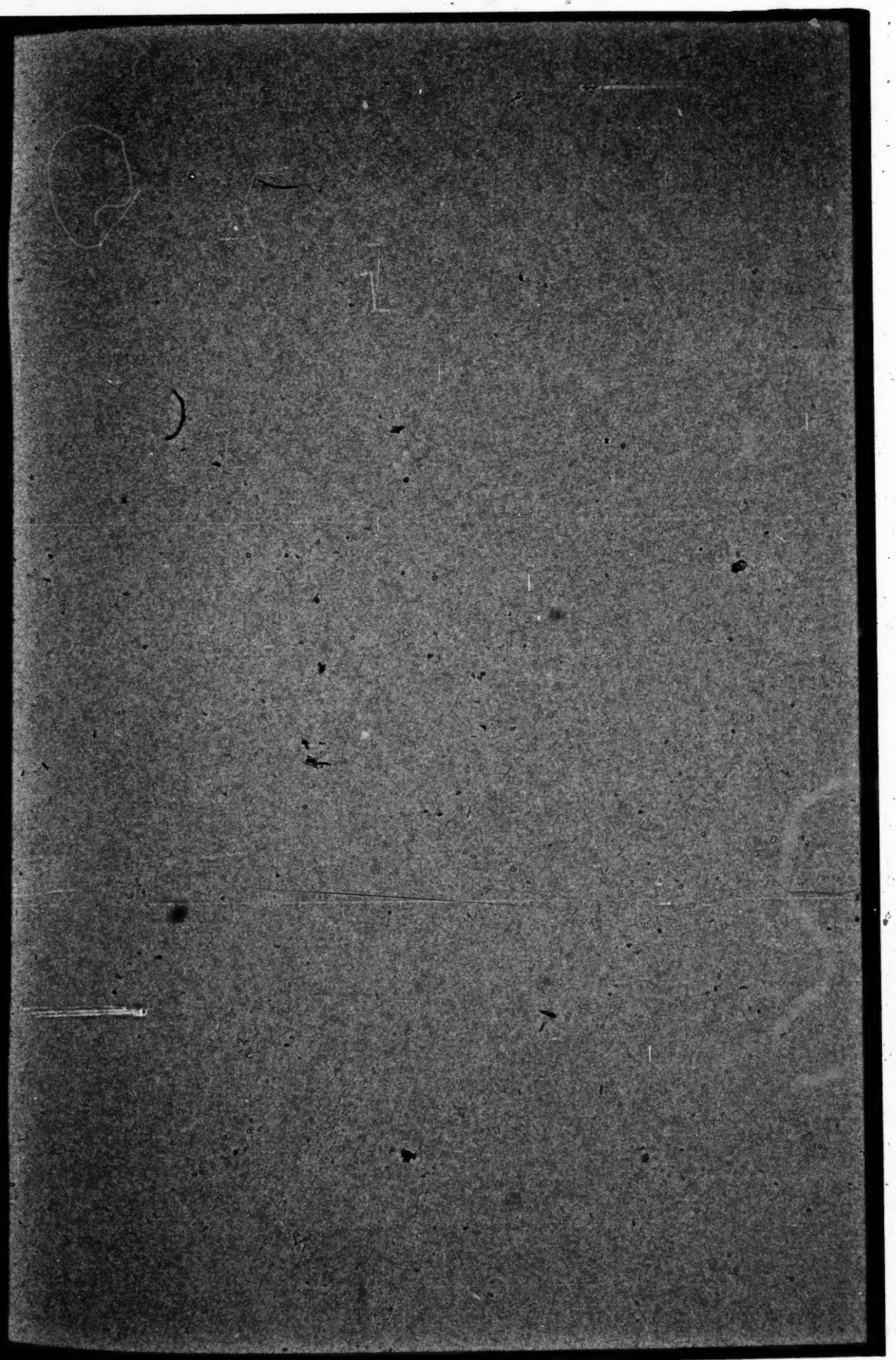
CELEBREZZE, Circuit Judge, concurring. I concur for the reason that the District Judge did not find that the sole purpose of Agent Daguanno's investigation was to gather evidence for a criminal prosecution. The parties stipulated that agent Daguanno was assigned to investigate one Montgomery's income tax liability for the years 1961 through 1966. During the course of his investigation he attempted to summon records of Montgomery's long distance telephone calls. Thus, aside from, but not inconsistent with, the District Court's finding that agent Daguanno's investigation was "primarily" criminal in scope, the record reveals that his investigation was also conducted for a civil purpose, namely, to determine Montgomery's liability for federal income taxes for the above-mentioned years.

It is well settled that the § 7602 summons may be used where the I.R.S. investigation has civil as well as criminal objectives. *United States* v. *DiGroso,* 405 F.2d 926 (3rd Cir. 1969); *Wild* v. *United States,* 362 F.2d 206 (9th Cir. 1966); see *Justice* v. *United States,* 365 F.2d 312, 313 (6th Cir. 1966). The United States Supreme Court has held, however, that this summons may not be used where the sole purpose of the I.R.S. investigation is to gather evidence for use in a criminal prosecution, *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964); see *Boren* v. *Tucker,* 239 F.2d 767 (9th Cir. 1965). In my opinion this was the purpose of the investigation conducted in *DiPiazza et al.* v. *United States,* —— F.2d —— (1969).[1] As I said in my dissenting opinion therein, the record did not disclose that the I.R.S. was conducting an investigation into the Appellants' civil tax liability. The record in this case, however, does disclose such a purpose. For this reason, the summons against Appellee

[1] Decided by this Court today.

would have been properly enforceable as "other lawful authority" under § 605 as it stood prior to its amendment by Congress in 1968.

I express no opinion at this time as to the effect of the recent congressional amendments on § 605, preferring to wait until that question is properly before us.



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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 240

JOSEPH COVELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FROM THE DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks a rehearing of the order of October 20, 1969, denying his petition for a writ of certiorari. The primary question which he now presents is whether Section 605 of the Federal Communication Act of 1934 (47 U.S.C. 605), rendered inadmissible telephone company records of long distance calls made by a government witness where the telephone company, in the absence of a subpoena, had previously furnished copies of these records to an F.B.I. agent.

As petitioner candidly states, this question was not presented in his original petition; nor was it reasonably comprehended among the issues which were presented there. In a substantial sense, then, the question

373-701—69

is presented out of time.[1] While we do not contend that this consideration necessarily deprives the Court of jurisdiction, cf. *White* v. *Texas,* 309 U.S. 631; 310 U.S. 530; Stern & Gressman, *Supreme Court Practice* (4 ed.) 526, it does suggest that the reasons for action must be pressing. As in the case of an effort to argue on the merits questions not raised in a petition, *Irvine* v. *California,* 347 U.S. 128, 129, or a motion to amend the questions presented in a petition after the time for filing has passed, *Costello* v. *United States,* 365 U.S. 265, 284, the Court should grant review in such circumstances only for the most compelling reasons. Stern & Gressman, *supra,* 298–299, 301. In this case, the question now sought to be presented would not warrant plenary review even if it had been timely presented.

1. The record here shows that on May 2, 1963, the New York Telephone Company received an anonymous letter (A. 542) that Merrill Garfinkel was using fictitious credit cards to make long distance telephone calls. The letter was referred to the F.B.I. and, on the following day, the telephone company showed F.B.I. agent Paul Newman its billing statements or toll slips for long distance calls charged to TR 9–3755, the home number of Merrill Garfinkel (A. 75–76, 88, 277–279). As a result of a surveillance of Garfinkel, the F.B.I. found him in a telephone booth using a false credit card to telephone HU 4–9011, one of the

[1] This Court's Rule governing petitions for rehearing on petitions for writs of certiorari refers to "*grounds* * * * confined to intervening circumstances," (Rule 58(2); emphasis added), but does not suggest that new *questions* may be presented as a result of intervening circumstances.

numbers used by petitioner and his associates in their wagering business (A. 76, 167, 185). At petitioner's trial for interstate wagering activities, Merrill Garfinkel testified as a government witness that on a daily basis from the summer of 1961 until June 1963, he wagered by telephone with petitioner and his associates, and telephoned the "line" to them (see, *e.g.*, A. 141–142, 145). Garfinkel said that he usually telephoned from public telephone booths but that he sometimes called from his home telephone, TR 9–3755 (see, *e.g.*, A. 141–142, 145). The government introduced into evidence the billing statements on Garfinkel's telephone containing a record of the long distance calls that he made including the date the call was made and the number and place called (A. 270–271, 500–527).

The government also introduced into evidence toll slips charged to PL 9–2829 and to HU 4–4190 which had been previously furnished to the F.B.I. pursuant to three letter requests, two pertaining to the former number and one to the latter. Petitioner and co-defendant Molinaro were separately listed as the subscriber to the latter number while one Charles Muselli was listed as the subscriber to the former number. Petitioner's objection to the introduction of these slips on the ground that the examination of the slips without a subpoena violated Section 605 of the Federal Communication Act was denied (A. 382–389, 401–403).[2]

[2] Prior to trial, petitioner moved for discovery of all toll slips of the telephone calls which were the subject of the various counts of the indictment on the ground that such items "may furnish evidence admissible on behalf of this defendant" (A. 25–27). The government furnished petitioner this information in its bill of particulars (A. 38–39).

On appeal, petitioner limited his objection to the Garfinkel toll slips.

2. The first clause of Section 605 of the Communications Act, as it then read,[3] provided that no person receiving or transmitting any interstate communication "shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof" other than, as relevant here, to "the addressee, his agent, or attorney, * * *, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed * * * in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority * * *." This clause must be read in light of its purpose, which was to protect the integrity of the communications system. *Bennanti* v. *United States,* 355 U.S. 96, 100. It "must be interpreted in the light of reason and common understanding to reach the results intended by the legislature" *Rathbun* v. *United States,* 355 U.S. 107, 109.

So considered, it is evident that the statute would not preclude the telephone company from furnishing toll records made in the ordinary course of its business to an investigating agency of the government which is attempting, at the request of the telephone company, to ascertain whether an individual (in this case Garfinkel) was defrauding the telephone company by means of fraudulent credit cards. The telephone company needed

[3] Whether Congress inadvertently or otherwise amended Section 605 in 1968 to forbid disclosures in response to subpoena or demand of other lawful authority (Reh. Pet. 8–10) is not an issue as to this 1967 conviction.

neither a subpoena nor a "demand of other lawful authority" to take such measures to protect its revenues.

Since this was the only circumstance made an issue before it, the court below properly found it unnecessary to consider whether a request by the F.B.I. to examine toll slips for an investigation not intended to assist the telephone company was covered by the first clause of Section 605 and was a "demand of other lawful authority." The decision of the Second Circuit thus is not in conflict with the decision of the Sixth Circuit in *DiPiazza* and *Deming* v. *United States*, 415 F. 2d 99, now pending on petitions for writs of certiorari on Nos. 960, 965, O.T. 1969. Significantly, what is implicit in Section 605—that the telephone company may take reasonable measures to protect its revenues—has now been made explicit by a provision of the Omnibus Crime Control and Safe Streets Act of 1968 which specifically provides that it is not unlawful for a communication carrier to intercept, disclose or use a communication which is necessary "to the protection of the rights or property" of the communication carrier. 18 U.S.C. 2511.

Beyond this, the exclusions from the prohibition against disclosures contained in the first clause of section 605 are not limited to "a subpena or other process," as petitioner contends. The statute authorizes disclosure, not only under subpoena, but on "demand of other lawful authority". The ordinary meaning of the latter phrase includes a request from a law enforcement agency, such as the F.B.I., authorized by Congress to engage in a criminal investigation. This interpretation places telephone messages on a par with

first class mail, for information appearing on the face of letters may be furnished to prosecuting officials without a subpoena. See *Schwartz* v. *United States,* 283 F. 2d 107 (C.A. 3), certiorari denied, 364 U.S. 942. The comprehensive plan for the regulation of interstate communication established by the Communication Act (see *Benanti* v. *United States,* 355 U.S. 96, 104) presupposes inspection of records by government agents, that is by "other lawful authority." Congress was not concerned with such disclosures but with disclosures by a communication employee "for his own benefit or for the benefit or another not entitled thereto" and with disclosures from unauthorized interceptions. See Clauses 2 and 3 of Section 605.

Significantly, the statutory restriction against disclosure in the first clause of Section 605 is limited to the employees of a carrier engaged in the receiving and transmitting of communications. It does not embrace the "accounting or distributing officers of the various communicating centers over which the communication may be passed * * *." This supports the conclusion that these accounting officers may disclose their accounting or toll records even when such records disclose the existence of a communication. Otherwise, Congress would not have limited its restriction to those persons engaged in telecommunications but would have included all employees of communication carriers. Toll slips, after all, are not the types of record which are inherently intended to be private. They should not be deemed privileged in the absence of a clear Congressional intent against disclosure. The subscriber of a telephone, like a guest at a hotel, is fully aware that

business records are being kept of the fact that he has made a call. This was noted as long ago as 1941, when Section 605 was construed not to preclude the introduction of telephone records at a trial. *United States* v. *Gallo*, 123 F. 2d 229, 231 (C.A. 2).

Finally, except for the time he was the actual subscriber, petitioner has no standing to object to the toll slips prepared for the purpose of having accounting records of long distance calls charged to another telephone company subscriber.[4] Such toll slips do not record any part of the receiver's message but merely the fact that the subscriber, or someone using his telephone, made a call to a particular number. In particular, as to the Garfinkel calls, petitioner had no standing to challenge the evidence since the subscriber, Garfinkel, testified at the trial that he made the particular calls recorded in the toll slips.[5]

For the foregoing reasons, it is respectfully submitted that the petition for rehearing should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

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[4] As noted above, in the court of appeals petitioner challenged only the toll slips as to Garfinkel calls.

[5] The fact that the telephone company had previously furnished copies to the F.B.I. does not affect the admissibility of these records at trial. "[I]t was a near certainty that the * * * [toll slips] would have been acquired by subpoena even had the original disclosures never occurred." *United States* v. *Pardo-Bolland*, 348 F. 2d 316, 321 (C.A. 2), certiorari denied, 382 U.S. 944. In any event, Garfinkel had the right to waive any invasion of his rights as a subscriber.

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On Petition for Rehearing from the Denial of the Petition for a Writ of Certiorari

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PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

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PETITIONER'S REPLY TO MEMORANDUM IN OPPOSITION

I

The Government urges that the merits of the question presented by the Petition for Rehearing should not be reviewed because, in the Government's view, Rule 58(2) " . . . refers to '*grounds* * * * confined to intervening circumstances,' . . . but does not suggest

that new *questions* may be presented as a result of intervening circumstances." (Memorandum in Opposition, p. 2, n. 1; emphasis added by Government.)

However, Rule 58(2) is not properly subject to the Government's narrow interpretation. The Rule does suggest that new questions may be presented, since it cites an example of such a case in the text of the Rule:

> "Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e.g. Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34, 50 S.Ct. 9, 10, 74 L.Ed. 147, footnote 1; Massey v. United States, 291 U.S. 608, 54 S.Ct. 532, 78 L.Ed. 1019), ..." Rule 58(2), Supreme Court Rules.

The *Massey* case, thus cited, is a criminal case in which the question presented on rehearing was not presented in the certiorari petition. The question was presented on rehearing because of an intervening decision of this Court. Other more recent examples of criminal cases in which this Court granted a petition for rehearing presenting a question not raised in the previously denied certiorari petition are *Kolod* v. *United States,* 390 U.S. 136 (1968) (granting petition for rehearing and vacating order denying certiorari) and *Black* v. *United States,* 385 U.S. 26 (1966) (same).

II

The Government's basic position on the merits is that Congress, in enacting Section 605 of the Communications Act of 1934, did not intend to restrict law enforcement agents' access to telephone company toll records of subscribers' interstate calls. (See Memorandum in Opposition, pp. 5-7). In the Government's

view: "Toll slips, after all, are not the types of record which are inherently intended to be private. They should not be deemed privileged in the absence of a clear Congressional intent against disclosure." (Memorandum in Opposition, p. 6.)

The Government's argument bears a remarkable similarity to the argument made by the Government in the first *Nardone* case, when this Court first construed Section 605. The Government there argued that Congress, in enacting Section 605, had not intended the Section's prohibitions against wiretapping to apply to law enforcement officers.

> "It is urged [by the Government] that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone* v. *United States,* 302 U.S. 379, 383 (1937).

This Court in *Nardone* noted the absence of any contemporary legislative history showing the Congressional intent behind Section 605. Accordingly, the Court construed the statute in accordance with its "plain words", instead of reading in the exception for government agents which the Government urged. *Nardone* v. *United States,* 302 U.S. 379, 382. Petitioner urges that no similar exception be read *sub silentio* into the Section 605 prohibitions against disclosure of toll records, without the case being heard upon the merits.

It is doubtful that the ordinary telephone subscriber considers that the identity of the subscribers whose numbers he calls is an open book, for Government or private investigators[1] to scrutinize. If that is the meaning of the law, it should obviously be a uniform law, applicable throughout the interstate telephone system—in Ohio as well as New York. The Government's and Second Circuit's construction of Section 605 as inapplicable to telephone toll records is irreconcilable with the view of the Sixth Circuit majority and dissent in *DiPiazza and Deming* v. *United States,* 415 F.2d 99 (6th Cir. 1969) (reprinted in the Appendix to the instant Petition for Rehearing), petitions for certiorari pending, Nos. 960, 965, O.T. 1969,[2] "that telephone company toll records containing an individual's long distance calls are protected by § 605 of the Communications Act." (Petition for Rehearing at p. 11a. See also *id.* at p. 5.) The conflict should be resolved by this Court; and nothing in the Memorandum in Opposition gainsays the importance of such an authoritative resolution.

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[1] *E.g.*, it appears from press accounts that records of toll calls charged to Senator Edward Kennedy's credit card had been divulged to a newspaper, the *Manchester Union Leader.* See Denniston, "Phone Caller's Right to Privacy", *Washington Evening Star,* January 9, 1970 (editorial page); "Telephone Official Among Nine Called for Kopechne Inquest", *Washington Evening Star,* August 30, 1969 (news section, AP dispatch).

[2] The Government's time for filing its responses to these petitions has been extended from January 18 to February 15, 1970.

The *DiPiazza* Court divided only as to whether the summons issued for the toll records was valid process. But in the instant case, no process was sought or obtained by the F.B.I.; and no showing of probable cause could possibly have been predicated upon the letter of an allegedly anonymous informant (542a), whose identity the F.B.I. professedly made no attempt to ascertain. (85a.)

Nor can the conflict between the Circuits in statutory construction be avoided by the Government's belated suggestion that the telephone company was entitled to disclose to the F.B.I. records of Merrill Garfinkel's toll calls, made to petitioner and others, in order to take "measures to protect its revenues." (See Memorandum in Opposition, pp. 4-5.) This ground for admissibility of the toll slips was never urged by the Government in the District Court. Thus there is no record or findings directed to the issue of whether the telephone company disclosed the records of its subscriber, Howard Garfinkel, for the alleged purpose of protecting its revenues or for the purpose for which the disclosure was in fact used in this case, namely to aid the F.B.I. in an investigation of interstate gambling.[3] The Government first raised this ground for admissibility in its answering brief in the Court of Appeals, and it was not accepted by the Second Circuit. The Court of Appeals, like the District Court, held the toll records admissible on the broad ground that § 605 had no application to disclosure of toll records—not on the narrow ground that the disclosure herein was within some statutory exception for investigations of telephone fraud. (See Pet. App. 10a; 401a.)

By failing to raise the ground in the District Court, where an appropriate record could have been made, the Government may well be foreclosed from urging it in this Court even if plenary review is granted. Compare *Giordenello v. United States*, 357 U.S. 480, 487-88 (1958). But in any event, the Government's argu-

[3] Nor was there any finding as to the authenticity of the "anonymous letter" on which the Government's argument is predicated (Memorandum in Opposition, p. 2).

ment is extremely tenuous on the existing record. The justification now urged for the telephone company showing the F.B.I. the toll records of a subscriber, Howard Garfinkel—that the telephone company received a letter from an allegedly anonymous informant saying that *Merrill* Garfinkel was using ficticious credit cards to make long distance phone calls (Mem. in Opp., pp. 2, 4)—ignores very pertinent circumstances: that the toll records disclosed were those of the subscriber Howard Garfinkel,[4] and that these toll records involved no credit card calls (82a). The circumstance that the telephone company allegedly received an anonymous letter complaining of the conduct of one subscriber's brother in New York, should hardly invade the right of other subscribers in New Jersey, including petitioner, to retain the privacy of the records of their telephone communications from the home number of the New York subscriber.[5]

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[4] Howard Garfinkel testified at trial that Merrill had used Howard Garfinkel's phone, located in Howard's bedroom, to make the calls reflected on Howard Garfinkel's toll slips. (244a, 260a). But even this information was unknown to the telephone company when it disclosed Howard's toll records to the F.B.I.

[5] The Government advances as another ground for admissibility, not advanced by it in the District Court, that the subscriber who receives the call has no standing to object to the telephone company's disclosure of its existence. But as stated by Judge Learned Hand in *United States* v. *Polakoff*, 112 F. 2d 888, 889 (2d Cir.), *cert. denied*, 311 U.S. 653 (1940): "It would deny all significance to the privilege created by § 605 to hold that because one party originated the call he had power to surrender the other's privilege." See also *United States* v. *Guglielmo*, 245 F. Supp. 534, 536 (N.D. Ill. 1965), *affirmed, sub nom United States* v. *Dote*, 371 F. 2d 176 (7th Cir. 1966), holding that both the callers and "their intended receivers" are within the protection of § 605. *Guglielmo* involved so-called "pen registers", which like toll slips, show only the number of the calling subscriber and of the receiving subscriber but not the contents of the communication.

The Government's contention (Mem. in Opp., pp. 2, 4), that the anonymous letter of May 2, 1963 justified the telephone company's disclosure of toll records to the F.B.I. on May 3, does not in any event dispose of all the toll records involved in the instant case. Some of the Garfinkel toll records admitted in evidence were prepared as late as July of 1963. (See, *e.g.*, Gov. Ex. 35, 526a-27a, which is dated 7-63.)

Moreover, even if the initial disclosure of the toll records—without any legal process—to the F.B.I. on May 3, 1963, were exempt from Section 605 as a telephone company "measure to protect its revenues" (see Mem. in Opp., pp. 4-5), it would still be necessary to determine whether Section 605 was violated by the introduction of these toll records into evidence at the trial of petitioner. For petitioner was charged with interstate gambling activities, not with defrauding the telephone company. The telephone company employee who identified the Garfinkel toll records at trial admitted that he had not produced them at trial pursuant to a subpoena. (273a-76a).

The Government's rationale for disclosure of the records of calls from Garfinkel's number (TR 9-3755) to Covello, cannot sustain an affirmance for a further reason: it has no possible application to the disclosure of the toll records of calls *from* Covello's home number, PL 9-2829. The Memorandum in Opposition is misleading in stating that "one Charles Muselli was listed as the subscriber to the former number [PL 9-2829]." (Mem. in Opp., p. 3.) The Government overlooks the stipulation, introduced in evidence by the Government at trial, that:

> "during the period about which there has been testimony or evidence concerning telephone calls

> thereto, the records of the New Jersey telephone company would indicate the following: . . . that telephone number PL 9-2829 was the home number of Joseph Covello, 25 Cottage Street, Belleville, New Jersey" (390a).

While there was an F.B.I. report for one period stating that "Telephone number PL 9-2829 is subscribed to by Charles Muselli, 25 Cottage Street, Belleville, New Jersey" (Gov. Ex. 43, 528a), a subsequent F.B.I. report stated: "Telephone number PL 9-2829 is subscribed to by Joseph Covello, 25 Cottage Street, Belleville, New Jersey" (Gov. Ex. 44, 531a.) The record also shows an F.B.I. request to the telephone company for a "Toll check on PL 9-2829 listed to Joseph Covello, 25 Cottage Street, Belleville, New Jersey." (Gov. Ex. 46, 538a.) Thus, even if calls from Howard Garfinkel's phone (TR 9-3755) to Covello's home (PL 9-2829) or his East Orange apartment (OR 6-1730) were not within the coverage of Section 605, the telephone company could not conceivably justify as "measures to protect its revenues" its actions in disclosing the toll records of calls *from* petitioner's home telephone, PL 9-2829. The introduction of these toll call records unavoidably raises the question of whether Section 605 applies—as the Sixth Circuit held and the Second Circuit denied—to telephone company records of subscribers' toll calls.[6]

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[6] The Memorandum in Opposition makes the unsupported suggestion that the objection to the toll records of calls from PL 2829 was abandoned on appeal. (See Mem. in Opp., p. 4.) But there was no conceivable reason to have waived such objection, and in the existing posture of the case when appellant briefed it, the admissibility of all the toll records would stand or fall together. The same oral opinion of the District Court, which was vigorously attacked on appeal, applied to all of the toll records in issue (401a-403a). Neither the District Court's opinion, nor the Gov-

The Government also suggests that this case does not present the issue of "Whether Congress inadvertently or otherwise amended Section 605 in 1968 to forbid disclosures in response to subpoena or demand of other lawful authority" (Mem. in Opp., p. 4, n. 3). But this issue, too, will be presented if the Court should grant certiorari and consider the award of a new trial. For at a new trial the 1968 amendment would (if petitioner's construction is correct) prohibit the Government from producing even under subpoena any telephone company toll records which might otherwise be admissible.

Respectfully submitted,

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ernment's argument for admissibility before the District Court, made any distinction as to the legal grounds for admitting the different categories of toll records (i.e. those of calls from the Garfinkel number and those of calls from petitioner's home number), so that appellant's attack on the District Court's ruling, if successful, would have resulted in a holding that all the toll records were inadmissible. A holding that the Garfinkel toll records were inadmissible would in itself have necessitated a new trial on all counts upon which petitioner had been convicted. However, the exhibits containing the records of the calls from petitioner's home number, PL 9-2829 (Gov. Exhs. 43, 44, 528a-36a), and the ruling admitting them (403a), were printed in the Appendix to Appellant's Brief, and cited in the body thereof (Appellant's Brief, p. 26).

END